

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FILED

MAY 23 1960

Joseph W. Stewart

CLERK

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,671

284

CURTIS BROTHERS, INC.,

Appellant,

v.

THOMASVILLE CHAIR COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. TAYLOR, JR.

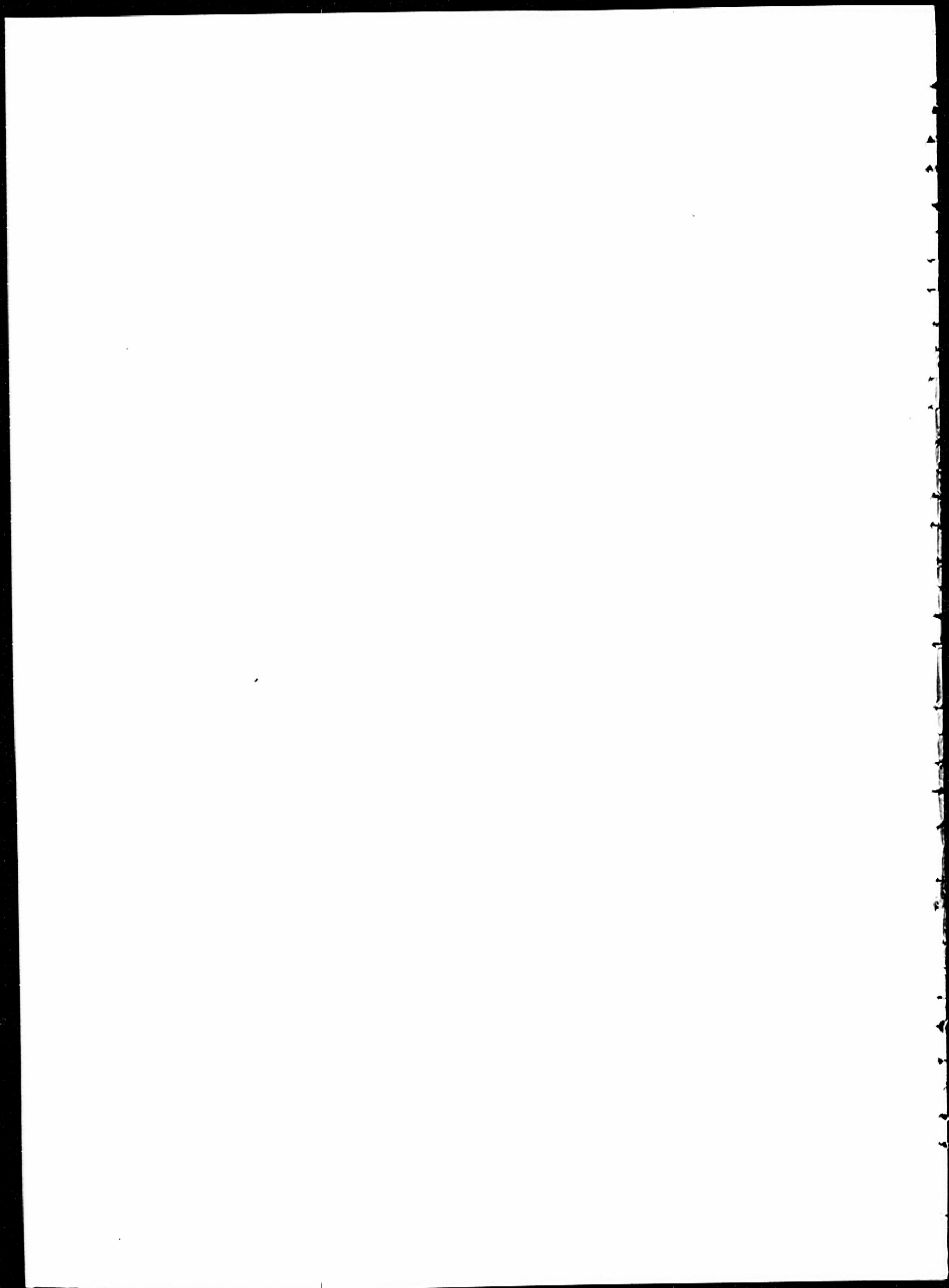
ROBERT S. ERNST

600 F Street, N. W.
Washington 4, D. C.

Attorneys for Appellant

Of Counsel:

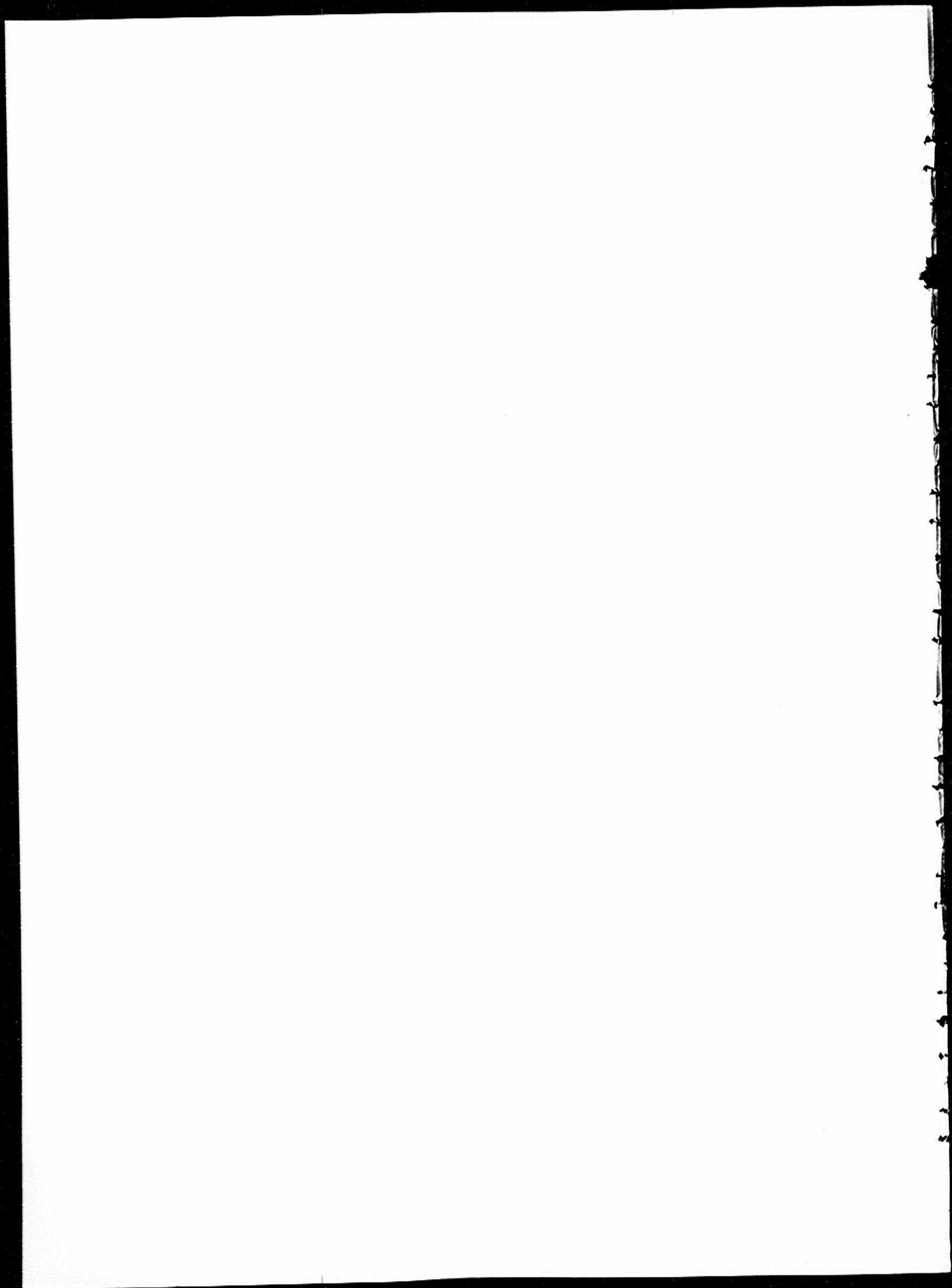
TAYLOR & WALDRON
600 F Street, N.W.
Washington 4, D. C.



(i)

QUESTIONS PRESENTED

1. Did the activities of Thomasville Chair Company, appellee, constitute transacting business under Sec. 12 of the Clayton Act (15 U.S.C.A. 22)?
2. Did the activities of Thomasville Chair Company, appellee, constitute transacting business under Sec. 29-933i(b) D.C. Code 1951, Supp. VIII, a provision of the new District of Columbia Business Corporation Act, known as the "Substantive Changes Act of 1959," which became effective September 21, 1959?



INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF CASE	2
STATUTES INVOLVED	3
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	15

TABLE OF CASES

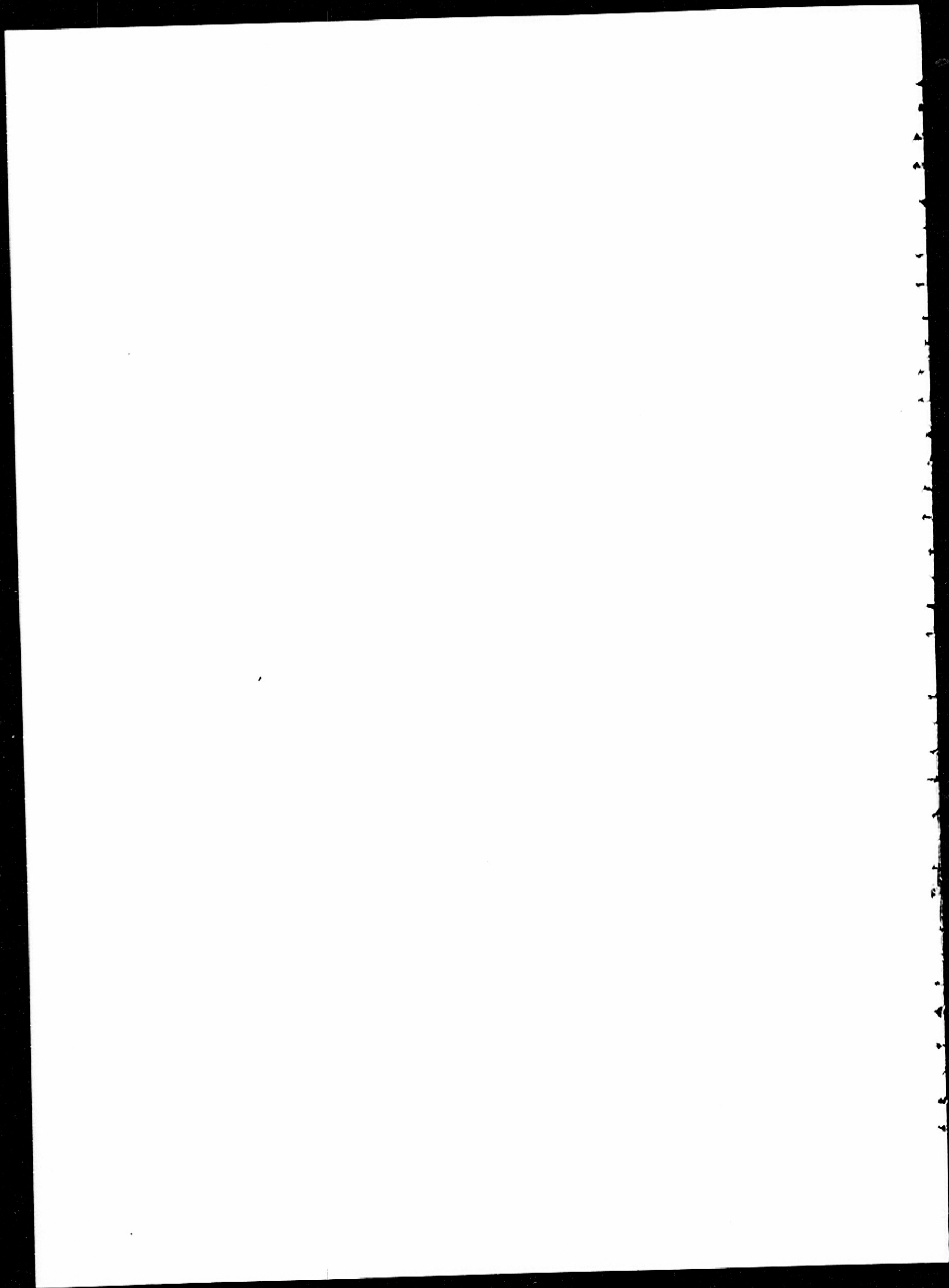
Callaway v. Hamilton Nat. Bank of Wash., 90 U.S. App. D.C. 228, 195 F.2d 556	12
Frene v. Louisville Cement Co., 77 U.S. App. D.C. 129, 134 F.2d 511	5, 9
Green v. Chicago, B. & Q. R. Co., 205 U.S. 530	7
International Shoe Co. v. State of Washington, et al, 326 U.S. 310	7
Wentling v. Popular Science Publishing Company, 176 F.Supp. 652	6, 7, 8

STATUTES AND RULES

15 U.S.C. 12	3
15 U.S.C. 13	2
15 U.S.C. 15	2, 3
15 U.S.C. 22	2, 4, 6
28 U.S.C. 1291.	2
D.C. Code 1951, Supp. VIII Sec. 29-933i(b)	2, 4, 5

MISCELLANEOUS

George Washington Law Review 23:769 Je '55	10
56 Column. L. Rev. 394, March 1956	11



UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 15,671

CURTIS BROTHERS, INC.,

Appellant,

v.

THOMASVILLE CHAIR COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia from an order dated January 18, 1960, granting defendant's Motion to Quash Service and defendant's Motion to Dismiss Complaint (J.A. 40). Appellant-plaintiff, hereinafter called plaintiff, sued defendant-appellee, hereinafter called defendant, for treble damages

due plaintiff as a result of defendant's violation of Section 2 of the Clayton Act, 15 U.S.C. 13, which makes unlawful a certain secret discriminatory price discount granted some of plaintiff's competitors by defendant which harmed the plaintiff in the conduct of its business in the District of Columbia and the Metropolitan Washington Area (J.A. 2). The lower Court had jurisdiction conferred by Section 4 of the Clayton Act (15 U.S.C. 15) and jurisdiction with mandatory venue by virtue of Section 12 of the Clayton Act (15 U.S.C. 22). (J.A. 2) Notice of appeal was filed February 4, 1960. This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF CASE

Plaintiff filed its complaint for treble damages under the provisions of the Clayton Act on January 15, 1958. Thereafter it issued summons and attempted to serve same each time plaintiff became aware Sam Harris, sales representative of the defendant, was within the District of Columbia. These efforts were unsuccessful. During this time Congress was contemplating the passage of legislation which would make service of process on the District of Columbia Superintendent of Corporations effective against foreign corporations who transacted business in the District of Columbia, but kept no office or agents within the District who might be served personally with process. The law was passed and became effective September 21, 1959 and shortly thereafter the Superintendent of Corporations was served under the provisions thereof, now Sec. 29-933i(b) D.C. Code 1951, Supp. VIII. Defendant responded to the service by filing a Motion to Quash Service and a Motion to Dismiss Complaint with a supporting affidavit executed by J. G. Pennington, secretary of the defendant Corporation (J.A. 6). Plaintiff filed points and authorities (J.A. 8), opposing said motions and a hearing was held on December 14, 1959, at which time plaintiff appeared with the manager of the plaintiff corporation and outlined to the Court the facts his testimony would establish (12/14/59 T 10-11). The trial court after considering whether to permit plaintiff

less than 24 hours to file an affidavit setting out the facts outlined to the Court decided to grant the motions to quash and dismiss and to permit reconsideration provided plaintiff was able to submit appropriate "facts in law" (12/14/59 T 190). Plaintiff forthwith filed a Motion for Reconsideration with an affidavit containing the facts the manager could have given in testimony (J.A. 14). This Motion for Reconsideration was lodged with the Court at the same time the order granting the Motions was presented. There was no unnecessary delay. Defendant opposed the Motion for Reconsideration and filed in support thereof affidavits of Thomas A. Finch, Jr., Executive Vice-President of Thomasville Chair Company and Sam Harris, sales representative of Thomasville Chair Company (J.A. 18). An affidavit of Harry E. Taylor, Jr., with certain exhibits attached (J.A. 22) was then filed in further support of the Motion for Reconsideration. A hearing was held on January 15, 1960, at which time plaintiff's Motion for Reconsideration was granted and after consideration of the complete record and legal arguments of counsel the Motion to Quash and Motion to Dismiss was granted by the Court (1/15/60 T 78). Plaintiff filed a timely notice of appeal (J.A. 40).

STATUTES INVOLVED

15 U.S.C. 12.

"' Antitrust laws,' as used in Sections 12, 13, 14-21, and 22-27 on this title, includes Sections 1-27 of this title."

15 U.S.C. 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court for the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold damages by him sustained and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. 22 (District in which to sue corporations).

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process may be served in the district of which it is an inhabitant, or wherever it may be found."

D.C. Code 1951, Supp. VIII Sec. 29-933i (b).

"If any foreign corporation shall transact business in the District without a certificate of authority, it shall by transacting such business, be deemed to have thereby appointed the Commissioners its agent and representative upon whom any process, notice, or demand may be served. Service shall be made by delivering to and leaving with the Commissioners, or with any clerk having charge of their office, duplicate copies of such process, notice, or demand, together with an affidavit giving the latest known post office address of such corporation and such service shall be sufficient if notice thereof and a copy of the process, notice, or demand are forwarded by registered mail, addressed to such corporation at the address given in such affidavit. Service pursuant to this subsection shall be subject to the requirements of the last sentence of subsection (a) of this section."

STATEMENT OF POINTS

1. The activities of Thomasville Chair Company as set forth in the affidavits of Charles W. Curtis (J.A. 15) and Harry E. Taylor, Jr., (J.A. 22) constitute transacting business in the District of Columbia under Sec. 12 of the Clayton Act (15 U.S.C.A., 22).

2. The activities of Thomasville Chair Company as set forth in the affidavits of Charles W. Curtis (J.A. 15) and Harry E. Taylor, Jr., (J.A. 22) constitute transacting business in the District of Columbia under Sec. 29-933i(b) D.C. Code 1951, Supp. VIII, a provision of the new District of Columbia Business Corporation Act, known as the "Substantive Changes Act of 1959," which became effective September 21, 1959.

SUMMARY OF ARGUMENT

The activities of Thomasville Chair Company as outlined in the affidavits of Charles W. Curtis (J.A. 15) and Harry E. Taylor, Jr., (J.A. 22) show that the defendant corporation transacted business in the District of Columbia and the lower court was in error when it quashed service and dismissed the complaint. Under the Section 12 of the Clayton Act it is not necessary to show more than solicitation to establish transacting business for the purposes of jurisdiction and venue in a suit against a foreign corporation. Even if solicitation plus is the test applied in anti-trust cases, plaintiff met the test.

Service on the Superintendent of Corporations was valid and effective. The activities of the defendant corporation as set forth in the affidavits of Charles W. Curtis (J.A. 15) and Harry E. Taylor, Jr., (J.A. 22) constitute transacting business in the District of Columbia. Under the provisions of D.C. Code 1951, Supp. VIII, Sec. 29-933i(b) solicitation alone is sufficient to support service in accordance with this statute. Even if solicitation plus is the test, plaintiff met the test. The Frene case indicates that the solicitation plus rule is not and should not be the law in the District of Columbia and continuous solicitation of substantial business over a long period of time will be enough evidence of transacting business to support service of process against a foreign corporation sued in a local District of Columbia Court. The rule on transacting business is more liberal in antitrust cases and the policy of the Congress in adopting the Clayton Act was to eliminate the need to chase defendant corporations into a foreign jurisdiction far from where the plaintiff suffered harm as a result of defendant's violation of the antitrust statutes.

Service of process in cases other than antitrust cases is often sustained in cases growing out of the activities of a foreign corporation within a jurisdiction when it would not be sustained if the suit did not arise from the conduct of the corporation's business activity with the jurisdiction.

The modern trend is to be realistic and recognize that selling is the life blood of business. Where goods pour into the District of Columbia and the money of its citizens pours out to a foreign corporation in a foreign jurisdiction, no injustice results where the foreign corporation is made to answer in the District of Columbia for injuries resulting to citizens of the District of Columbia who have been harmed as a result of the business activities of the foreign corporation within the District of Columbia. It is only proper that a foreign corporation willing to profit from sales in the District of Columbia assumes the risk of litigation in its Courts.

ARGUMENT

Wentling v. Popular Science Publishing Company, 176 F. Supp. 652, a recent case decided by the United States District Court for the Middle District of Pennsylvania, considered the test to be adopted in determining whether a corporation is transacting business for the purpose of suit and service under Section 12 of the Clayton Act, 15 U.S.C.A. Sec. 22. Lyman Gun Sight Corporation, one of several defendants, filed a motion to dismiss the complaint as to it because of improper venue. By affidavit it presented facts in support of its motion similar to those presented by the defendant in the instant case. In the Wentling case on page 657 District Judge Follmer said:

"Attached to Lyman's motion to dismiss, dated June 16, 1958 and filed June 17, 1958, is the affidavit of Henry B. Leader, its attorney. Under date of April 2, 1959, Lyman filed affidavit of its President, Charles Lyman, 3rd, dated April 1, 1959. The Lyman affidavit confirmed and enlarged upon the Leader affidavit and set forth, inter alia, as follows, to wit:

"Lyman is a corporation organized and existing under the laws of Connecticut, has not been domesticated in Pennsylvania, has no agent in Pennsylvania to receive process and has no subsidiary in Pennsylvania. It does not solicit orders through salesmen in the district, has no resident agent or representatives, nor resident

employees of any nature in the district. The Lyman product coming into the district is purchased by independent merchants based on orders received in Connecticut, and accepted or rejected by Lyman in Connecticut; no prices are established in Pennsylvania; no sales made in Pennsylvania, and no payments are received in Pennsylvania. Lyman neither maintains nor owns any office, factory, warehouse or other real estate or installation in this district, and pays no rents in this district. Lyman has no tangible personal property, no telephone listing and pays no business-taxes in this district. Lyman has no corporate records or books of account, no bank accounts or stock transfer agent, and does no financing through institutions in the district. None of Lyman's shareholders or directors live in this district and no meetings of either group are held in this district. Lyman's magazine advertising is directed to a national audience and it does no local magazine, newspaper, radio or television advertising in the district."

Notwithstanding these facts, the motion to dismiss was denied on the basis of sales, some advertising, and two good will tours, one by the Secretary of the company and one by the Secretary and an employee. One of the tours was in April, 1957 and one in March, 1958 (p. 658).

Following the trend which was established when the United States Supreme Court rejected the antiquated concepts of "doing business" found in Green v. Chicago, B. & Q. R. Co., 205 U.S. 530 by its decision in International Shoe Co. v. State of Washington, et al, 326 U.S. 310, the trial judge on page 658 of the Wentling Case states:

"In seeking to determine the question of venue with relation to Lyman, we have again to apply the test of "business of a substantial character" as above indicated originally propounded in Eastman, supra, and reaffirmed in Scophony, supra, after noting that refinements such as previously were made under the 'mere solicitation' and 'solicitation plus' criteria were no longer determinative, and pointing out that in Eastman, supra, under the broader room given by Section 12 venue was held to have been established where under the earlier tests of Section 7 of the Sherman Act the company was not 'present' either for the purpose of venue or as being amenable to service of process, then went on to say (333 U.S. 795, 68 S.Ct. 862):

"Thus, by substituting practical business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found' - 'present' - 'carrying-on-business' sequence, the Court yielded to and made effective Congress remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or resident. A corporation no longer could come to a district perpetrate there the injuries outlawed, and then by retreating to its headquarters defeat or delay the retribution due.

"The unmistakable trend both by legislation and by court decision has been to expand the concept of what constitutes doing business in a state by a foreign corporation. While the volume of business done in the state has frequently been the controlling factor in arriving at this determination, certainly it is not the sole test. In 1931 in *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation*, 1 Cir., 46 F.2d 623, 625, the court stated, 'The sale of goods is not essential to constitute transacting business.' See also *Abrams v. Bendix Home Appliances, Inc.*, D.C.S. D.N.Y., 96 F.Supp. 3, 8. 'It is the totality of acts and conduct rather than isolated and fragmented items thereof which must govern.' *Abrams v. Bendix Home Appliances*, supra.

"The problem here is well stated in *Echverry v. Kellogg Switchboard & Supply Co.*, 2 Cir., 175 F.2d 900, 902-903 as follows:

"The published decisions on what constitutes 'doing business' in a state by a foreign corporation are literally legion. Yet in spite of this vast array of judicial authority, border-line cases still have to be decided each on its own peculiar set of facts, which too often cannot be fitted into a stereotyped pattern. In this field realism, not formalism, should be dominant; the problem must be solved in the light of commercial actuality, not in the aura of juristic semantics. In *United States v. Scophony Corporation*, 333 U.S. 795, 810, 68 S.Ct. 855, 863, 92 L.Ed. 1091, Mr. Justice Rutledge spoke of 'the practical nontechnical business standard.' "

In concluding the Wentling case as to Lyman Gun Sight Corporation the trial justice stated on page 659:

"It is my opinion that from the average business man's point of view the activities of this defendant constitute the transaction of business in the Middle District of Pennsylvania."

It is of interest to note that Mr. Justice Rutledge delivered the opinion of the United States Supreme Court in the *Scophony* case on April 26, 1948. While a member of the United States Court of Appeals for the District of Columbia he adopted a similar view indicating abandonment of the solicitation plus rule in the District of Columbia. This was done in *Frene v. Louisville Cement Co.*, 77 U.S. App. D.C. 129, 134 F.2d 511, (D.C. Cir. 1943). It was not an antitrust action, but nevertheless the court then realized that solicitation might itself be the heart of doing business, and held a foreign corporation subject to the jurisdiction of our court.

In the *Frene* case the question was whether the activities of one Lowell, sales representative of the defendant foreign corporation, constituted "doing business" or "transacting business" within the District so as to make the corporation amenable to process in the District.

Lowell, in addition to solicitation of orders, did other acts to promote good relations and stimulate sales not authorized by the corporation which contended that "with the exception of orders for the products of the Company he has no authority to represent said Louisville Cement Company in any wise whatever. Lowell testified in support of this view" (p. 131).

Justice Rutledge speaking for the Court on p. 134 states:

" . . . In general the trend has been toward a wider assertion of power over non-residents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up.

" . . . But when jurisdiction has been extended to include some types or kinds of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to

say the least, anomalous. Solicitation plus maintaining an office is sufficient. Solicitation plus maintaining a warehouse likewise sustains jurisdiction. Solicitation plus making deliveries, collections, and handling claims, has like effect. Solicitation without these additional activities, or any of them, may be more sustained, more insistent, more productive or business than it is with them. Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling', 'the taking of orders', 'solicitation' as not 'doing business'. The merchant or manufacturer considers these things the heart of business. It is perfectly possible, under the 'mere solicitation' rule, for a foreign corporation to confine its entire market to a single jurisdiction, yet by carefully limiting its activities there to the soliciting phase, to force each of its customers having cause for legal redress to seek it in the foreign forum of incorporation. By careful segregation of the 'selling' phase in the place of market, a substantially complete immunity, in the practical sense, could be created.

"It would seem therefore, that the 'mere solicitation rule' should be abandoned when the soliciting activity is a regular, continuous and sustained course of business as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business', and should do so in the legal sense"

The court in reversing the trial court found, " . . . it unnecessary to take the final step in repudiation in this case, since the facts are sufficient to bring it with the 'solicitation plus' rule." (p. 135)

Much has been written by legal scholars which clearly demonstrates the rapid abandonment of the "solicitation plus" rule and the recent decisions of the Supreme Court reveal it will apply a test of fair play. See George Washington Law Review 23:769 Je '55 p. 772 and also page 770 wherein the writer notes that:

"Recognizing that solicitation might itself be the heart of doing business, some courts have found it enough to render a corporation amenable to service of process. *Frene v. Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943)."

In 56 Column. L. Rev. 394, Mar. 1956 appears a comprehensive survey entitled what constitutes "Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts." Section C of this study is entitled "Venue in Civil Suits Brought Under the Anti-Trust Laws" p. 416 contains the following:

"Section 12 of the Clayton Act provides that civil suits under the antitrust laws may be brought against a corporation in any district in which it transacts business. From the beginning it has been held that the transacting of business test can be met by fewer local contacts than the 'doing business' test requires. The Supreme Court in *United States v. Scophony Corp.* held that the 'transacting business' test was fulfilled if the corporate defendant were engaged in 'any substantial business operations'. 'Practical business conceptions' stated the Court should be substituted 'for previous hairsplitting legal technicalities encrusted upon the 'found' - 'present' - 'carrying on business' sequence.' In applying this method to subsequent cases the courts have held that having a full-time salesman in a district will satisfy the venue requirements even if the salesman does not have an office in the District. Only in the case in which the business solicited is a mere trifle will the courts say that the corporation is not 'transacting business'.

"As the corporations contacts with the forum get more tenuous the courts put more stress on the requirement of substantiality in terms of dollar volume in sales and perhaps advertising. To determine what constitutes substantiality some courts have relied on the percentage of a company's sales made within a district, but, for big companies the more recent cases seem to adopt the better view, that the test of substantiality is the average business man's conception. Thus, one-half of one per cent of a medium-size steel company's total sales is more than enough to sustain venue even with a minimum of other contacts. Periodic visits throughout the year by company salesmen will sustain venue on a smaller volume, provided that it can be shown that the visits are regular, rather than so sporadic that they may never be repeated. Even when a corporation does not send salesmen into a district it can be sued there if its representatives make monthly visits to keep up good will. It has been held recently that the delivery in less than two years of \$600,000 worth of goods into a state in the filling of

orders obtained outside the state, can support jurisdiction, even without regular visits by company representatives. Finally it has been held that soliciting orders solely by mail without any local good will visits is 'transacting business' when the sales obtained in the district through the mail totalled \$25,000 a year." See *Green v. Chewing Gum Mfg. Co.* 224 F.2d 369 (5th Cir. 1955).

The *Green* case, *supra*, reviews the authorities and removes all doubt that under the Clayton Act the defendant Thomasville Chair Company was transacting business within the District of Columbia and as a result is subject to suit and service in this jurisdiction. In the *Green* case, *supra*, the defendant U.S. Chewing Gum Mfg. Co. moved to dismiss the complaint for lack of jurisdiction over it or improper venue, supporting its motion by an affidavit of its President. The trial court dismissed the complaint as to the defendant, U.S. Chewing Gum Mfg. Co. and stated on page 371:

"I do not believe, gentlemen, that a citizen of California who receives orders by mail and then forwards the merchandise ordered in interstate commerce to the customer who has ordered by mail is amenable to suit filed against him in the place of the purchaser."

On appeal the court held otherwise and reversed and remanded.

On a motion to dismiss, plaintiff's allegations are to be taken as true and all reasonable inferences arising therefrom are to be indulged. *Callaway v. Hamilton Nat. Bank of Wash.* 90 U.S. App. D.C. 228, 195 F.2d 556. The complaint filed herein shows that Thomasville manufactures and sells its furniture products throughout the United States, and in the District of Columbia (J.A. 3). It also alleges that defendant transacts business within and may be found in the District of Columbia (J.A. 3). Further the complaint charges certain of plaintiff's competitors in or about the Metropolitan District of Columbia area buy the furniture products of defendant. Also in the complaint it appears that at least from 1949 to 1957 defendant sold its furniture products to plaintiff and

its competitors and some of the competitors were granted secret discounts or rebates (J.A. 3). The complaint in addition states that the defendant by its business conducted in the District of Columbia area has damaged plaintiff in the amount of \$100,000.00 (J.A. 4).

The affidavit of J. G. Pennington, Secretary of Thomasville Chair Company, filed December 2, 1959, shows that defendant manufactures wood household furniture in plants all located at Thomasville, North Carolina and sells its furniture to wholesalers and retailers throughout the United States (J.A. 7). Defendant sells its furniture to department stores and furniture retailers within the District of Columbia and has a sales representative whose territory includes the District (J.A. 7).

The affidavit of Charles W. Curtis, General Manager of Curtis Brothers, Inc., filed December 13, 1959, states that defendant has transacted business with plaintiff for at least fifteen years; during this time the defendant's sales representative called approximately every two weeks (J.A. 15). The affidavit also states that Thomasville sells approximately one million dollars worth of furniture in the District of Columbia area through its sales representative (J.A. 17). This affidavit also sets out the activities of Sam Harris which created good will and stimulated sales for Thomasville but, it is contended, were unauthorized or unknown to the defendant (J.A. 16).

The affidavit of Thomas A. Finch, Executive Vice President of Thomasville Chair Company, filed December 23, 1959 admits that Sam Harris was authorized to solicit orders from furniture wholesalers and retailers within the District of Columbia (J.A. 20).

The affidavit of Sam P. Harris, sales representative of Thomasville Chair Company, admits that his territory includes the District of Columbia and that for many years he did solicit orders from plaintiff (J.A. 21). It admits that Sam Harris on one occasion went to the home of a Curtis Brothers' customer to inspect Thomasville merchandise about

which Curtis Brothers had received a complaint (J.A. 21). Further Sam Harris admits that his regular trips to Washington, D. C. continued in 1958 and 1959 (J.A. 22).

The affidavit of Harry E. Taylor, Jr. shows that in addition to solicitation of orders Sam Harris did on at least one occasion request cancellation of an order placed through Sam Harris by Curtis Brothers and the defendant by letter dated March 5, 1956 states: "In reply to a request by our Mr. Harris we have cancelled . . ." (J.A. 25).

Never has the defendant challenged the fact that it sells about one million dollars of its furniture annually to customers in the District of Columbia area.

It is respectfully submitted that even if this were not an anti-trust case growing out of business transacted in the District of Columbia the defendant by its activities was subject to suit and service of process in the District of Columbia. Even if the "solicitation plus" rule still was law in the District the complaint and affidavits show sufficient facts to satisfy the rule.

Can there be any doubt that the defendant when asked, except during litigation, whether it does business in the District of Columbia answers in the affirmative? Can there be any doubt that the average businessman apprised only of the fact defendant had regular yearly sales of approximately one million dollars to customers in the District of Columbia area would say that defendant did business in the District of Columbia? Can there be any doubt in the minds of the Court that the defendant has transacted business within the District of Columbia and has had much more than the isolated minimum contacts necessary to provide a foreign corporation immunity from the jurisdiction of our courts?

CONCLUSION

Controlling decisions of the Supreme Court, consistent with the modern legal trend, entitle plaintiff to sue and serve process on the defendant in the District of Columbia. Accordingly, the order of the Court below granting defendant's Motion to Quash Service of Process and defendant's Motion to Dismiss Complaint, should be vacated. Both motions should be denied, and defendant directed to file a responsive pleading on the merits of the complaint.

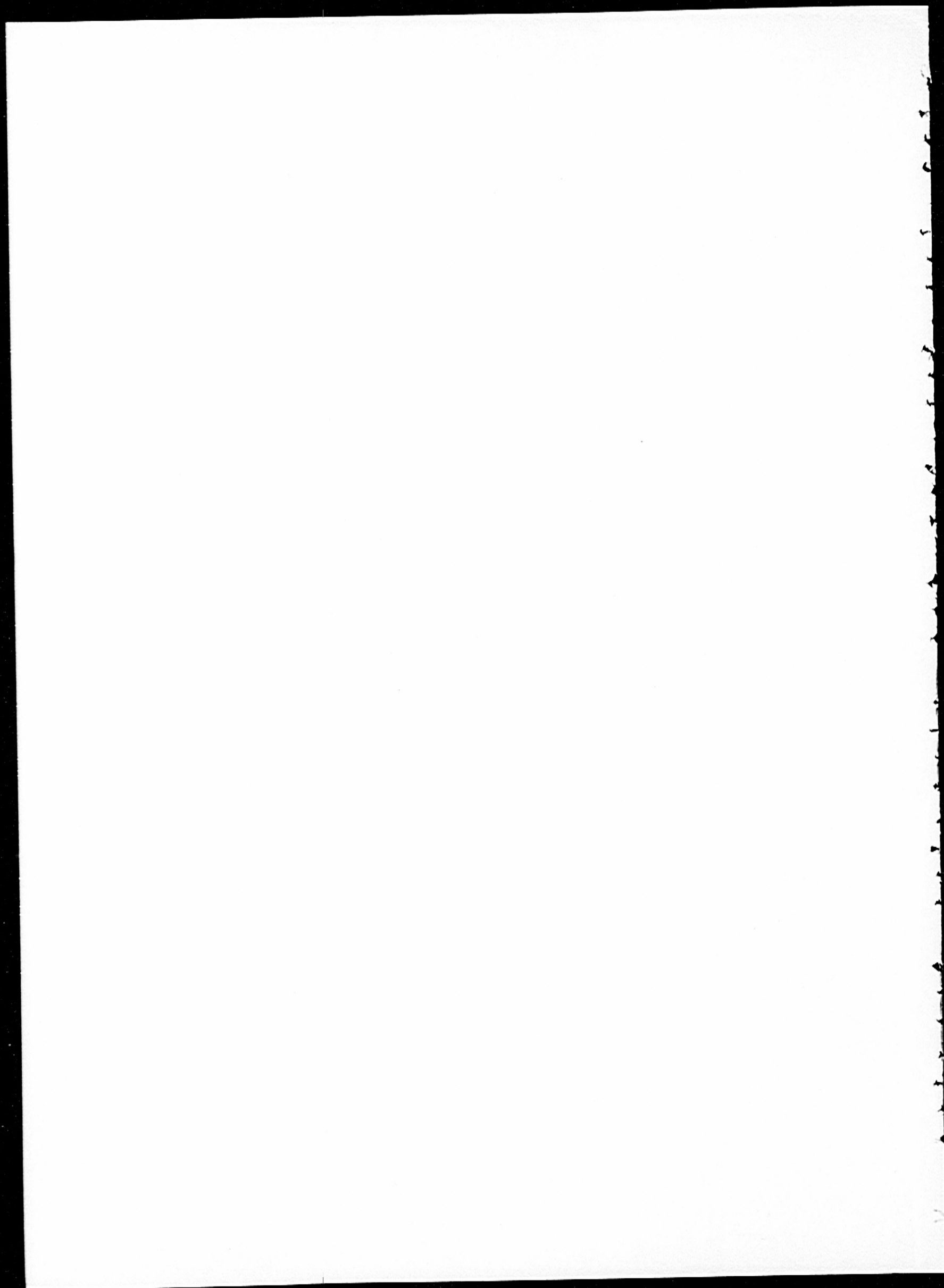
Respectfully submitted,

HARRY E. TAYLOR, JR.
ROBERT S. ERNST
600 F Street, N.W.
Washington 4, D. C.

Attorneys for Appellant

Of Counsel:

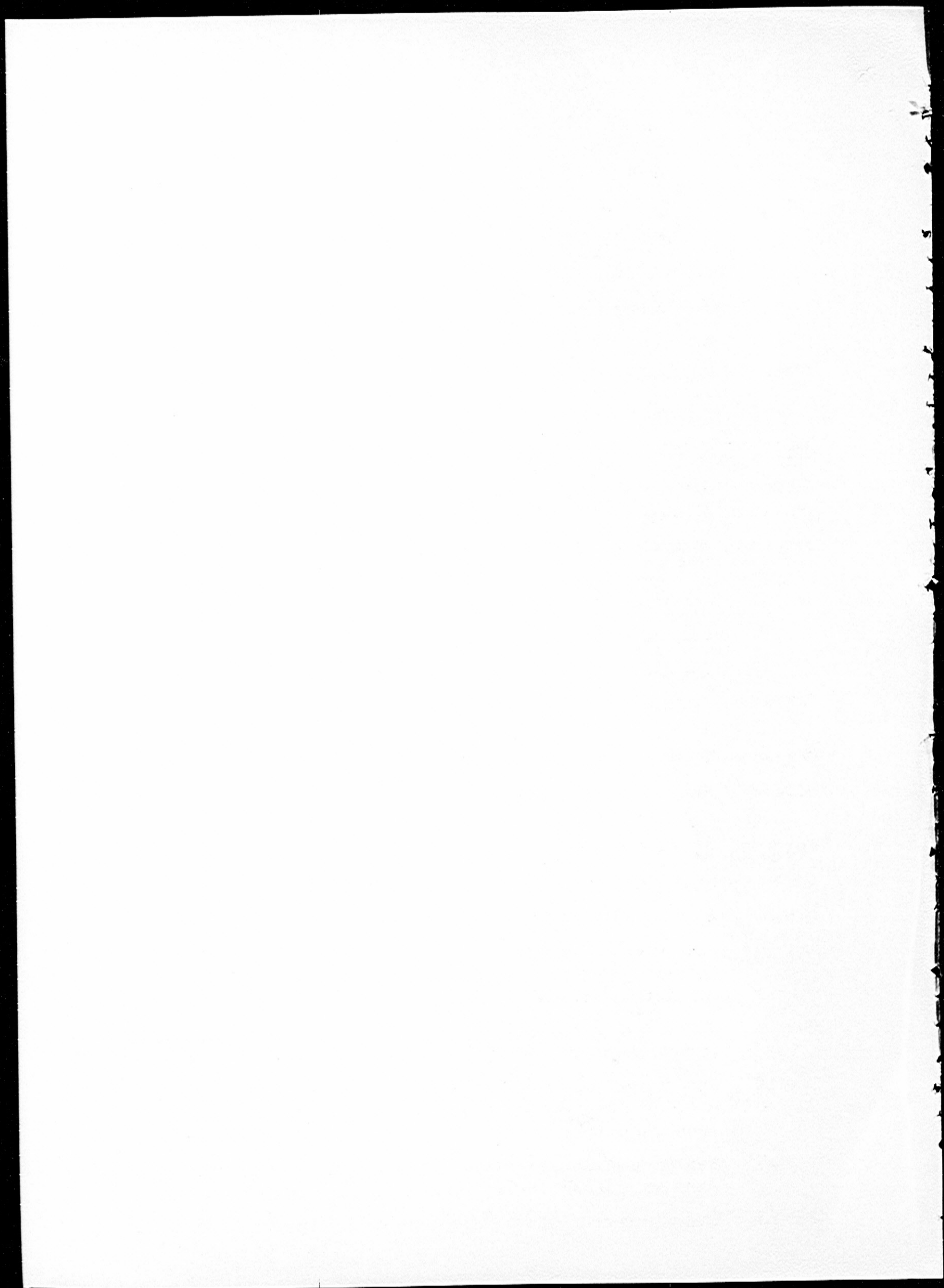
TAYLOR & WALDRON
600 F Street, N.W.
Washington 4, D. C.



(i)

INDEX

	<u>Page</u>
Docket Entries	1
Complaint for Damages	2
Affidavit of Charles W. Curtis	5
Motion to Quash Service and to Dismiss Complaint	5
Affidavit of J. G. Pennington in Support of Motions to Quash Service of Process of Complaint, and to Dismiss Said Complaint	6
Points and Authorities in Opposition to Motions to Quash and Dismiss	8
Excerpts from Transcript of Proceedings of Dec. 14, 1959	9
Order Granting Motions to Quash Service and Dismiss Complaint and Leave to File Motion for Reconsideration	13
Motion for Reconsideration of Motions to Quash and Dismiss	14
Affidavit of Charles W. Curtis	15
Opposition to Plaintiff's Motion to Reconsider Orders Quashing Service and Dismissing Complaint	18
Affidavit of Thomas A. Finch, Jr.	19
Affidavit of Sam P. Harris	21
Affidavit of Harry E. Taylor, Jr., in Support of Motion for Reconsideration of Motions to Quash and Dismiss	22
Exhibit No. 1	23
Exhibit No. 2	24
Exhibit No. 3	25
Exhibit No. 4	25
Excerpts from Transcript of Proceedings of January 15, 1960	26
Opinion of The Court	39
Order Granting Motion to Reconsider and Granting Defendant's Motions to Quash Service of Process and Dismiss Complaint	40
Notice of Appeal	40



JOINT APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CURTIS BROTHERS, INC.

VS.

THOMASVILLE CHAIR CO.

Civil Action No. 118-58

CIVIL DOCKET

Date	Proceedings	***
1958	Deposit for cost by	
Jan 15	Complaint, appearance, Jury Demand,	
Jan 15	Summons, copies (1) and copies (1) of Complaint issued N.F. 2-5-58	
May 8	Summons, copy (1) & copy (1) of complaint N.F. 5-29-58	
Aug 6	Summons copy (1) & copy (1) of complaint N.F. 8-27-58	
Oct 9	Summons copy (1) & copy (1) of complaint N.F. 10-30-58	
Nov 13	Summons copy (1) & copy (1) of complaint. N.F. 12-4-58	
1959		
May 4	First notice under Rule 13	
May 8	Summons copy (1) & copy (1) of complaint issued. N.F. 5/29/59	
Oct 9	Affidavit of non-residence.	
Oct 9	Summons copy (1) and copy (1) of complaint. NF 10-30-59	
Nov 10	Summons copies (2) and copies (2) of complaint. ser 11-12-59	
Dec 2	Motion of deft to quash service and to dismiss complt; Notice; Affidavit; c/m 12-2-59; P and A; Appearance of Raymond S. Smethurst. M.C. 12-2-59.	filed.
Dec 9	Points and authorities of pltf in opposition to motion of deft to dismiss; c/m 12-8-59.	filed.
Dec 16	Order granting motion to quash service, granting motion to dismiss complaint and granting pltf leave to file motion for reconsideration. (N)	Keech, J.
Dec 17	Motion of deft for reconsideration of motions to quash and dismiss; c/m 12-15-59; Affidavit; M.C. 12-17-59.	filed.
Dec 23	Opposition of pltf to defts motion to reconsider orders (cont.)	

Date	Proceedings	***
1959	(cont.)	
Dec 23	quashing service and dismissing complt; affidavits (2); P and A; c/m 12-23-59.	filed.
1960		
Jan 7	Affidavit of Harry E. Taylor, Jr. in support of motion for reconsideration of motions to quash and dismiss; c/m 1-7-60; Exhibits #1, #2, #3, and #4.	filed.
Jan 18	Order affirming order of 12-16-59 granting deft's motion to quash service and dismiss complt. (N) Keech, J.	
Feb 4	Notice of Appeal by pltf on order of 1-28-60; Deposit by Taylor, \$5.00; Notice mailed to Smethurst.	filed.
Feb 4	Cost bond on appeal of pltf in the sum of \$250.00 with Glens Falls Insurance Company, approved and	filed.
Feb 11	Designation of record on appeal; c/m 2-11-60.	filed.
Mar 2	Motion of deft to compel pltf to furnish additional parts of transcript; Notice; c/m 3-2-60; P and A; M.C. 3-2-60.	filed.

[Filed January 15, 1958]

PLAINTIFF DEMANDS
TRIAL BY JURY

COMPLAINT FOR DAMAGES

Plaintiff, by its attorney, Harry E. Taylor, Jr., Esq., for its complaint herein, alleges:

1. This is an action for damages for violation of the provisions of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. Sec. 13. Jurisdiction is conferred on this Court by Section 4 of the Clayton Act, 38 Stat. 731 (15 U.S.C. Sec. 15) as hereinafter more fully appears.

2. At all times hereinafter mentioned plaintiff was and is a Delaware Corporation with a principal office for the conduct of its business at No. 2041 Nichols Avenue, S.E., Washington, D.C., from which location plaintiff conducts a retail furniture, moving, storage, and rug cleaning business. Plaintiff's sales of goods and services are in interstate commerce, plaintiff's customers residing in the District of Columbia, Virginia, Maryland, and other states of the United States.

3. Upon information and belief defendant is a North Carolina

corporation. Defendant's principal office for the conduct of its business is Thomasville, North Carolina, from which location it conducts a business of manufacturing and selling, to wholesale and retail establishments located throughout the United States, and including the District of Columbia, a line of furniture products including but not limited to such items as beds, dressers, bureaus, chests, cabinets, tables, desks, chairs, and the like. Defendant's sales are in interstate commerce.

4. Defendant transacts business within, and may be found in the District of Columbia.

5. At all times herein mentioned plaintiff, in selling furniture products at retail as aforesaid, was and is in direct and substantial competition with numerous other retail stores in or about the Metropolitan District of Columbia area. Such competitors include but are not limited to the William E. Miller Furniture Co., Inc., located at 8th and Pennsylvania Avenue, S.E., Washington, D.C., (hereinafter referred to as "Miller").

6. Plaintiff and said Miller, and other of plaintiff's competitors not now known to plaintiff, purchased, at all the times herein mentioned, furniture products of like grade and quality, from defendant, for resale at retail as aforesaid.

7. Beginning some time prior to the year 1949 and continuing to and including the year 1957 defendant, in the course of selling furniture products of like grade and quality to plaintiff and to plaintiff's competitors as aforesaid, sold and offered for sale said furniture products to said Miller and to other of plaintiff's competitors not now known to plaintiff (all hereinafter referred to as "favored" competitors) at lower prices than those at which said furniture products were sold or offered for sale to plaintiff. Said lower prices were either directly lower, or were brought about through the granting by defendant to said favored competitors of hidden or secret discounts or rebates which resulted in lower prices to said favored competitors, or through other means not now known to plaintiff.

8. The sales at lower prices, by defendant as aforesaid, were discriminations in price in violation of subsection (a) of the Robinson-Patman Act (15 U.S.C. Sec. 13(a)).

9. Said discriminations in price, in violation of the Robinson-Patman Act as aforesaid, have had the effect of damaging plaintiff's business by:

(a) Causing plaintiff losses due to its attempts to compete with said favored competitors and meet their prices for defendant's said furniture products at retail;

(b) Causing plaintiff loss of sales of defendant's said furniture products due to plaintiff's inability to meet the prices, for defendant's said furniture products at retail, of said favored competitors;

(c) Causing plaintiff loss of sales of merchandise other than defendant's said products due to plaintiff's inability to meet the prices, for defendant's said furniture products at retail, of said favored competitors;

(d) Injuring plaintiff's ability to compete generally with said favored competitors;

(e) Injuring plaintiff's reputation and good will through its inability to compete in the sale of defendant's products as aforesaid, and thereby obtaining for plaintiff an undeserved reputation for high prices generally.

10. By virtue of the premises plaintiff has been injured in its business and has suffered damage in the amount of \$100,000.00.

11. Under the provisions of Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15, plaintiff is entitled to recover of the defendant three fold damages sustained by it, together with costs of this suit and a reasonable attorney's fee.

WHEREFORE plaintiff prays for judgment against defendant in the sum of \$300,000.00, together with its costs, a reasonable attorney's

fee, and such other and further relief as to this Court shall appear just.

Dated: December 3, 1957

/s/ Harry E. Taylor, Jr.

Attorney for Plaintiff

Of Counsel,
WEIL, GOTSHAL & MANGES

By /s/ Ira M. Millstein

[Filed October 9, 1959]

AFFIDAVIT OF CHARLES W. CURTIS

District of Columbia, to wit:

Charles W. Curtis, being first duly sworn, under oath deposes and says that the defendant Thomasville Chair Company's last known mailing address is Thomasville, North Carolina.

CURTIS BROTHERS, INC.

By: /s/ Charles W. Curtis
Secretary

[Jurat dated October 7, 1959]

[Filed December 2, 1959]

I.

MOTION TO QUASH SERVICE

II.

MOTION TO DISMISS COMPLAINT

Comes now defendant, THOMASVILLE CHAIR COMPANY, appearing specially through its attorney, and respectfully moves this Court as follows:

1. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of the State of North Carolina and was not and is not subject to service of process within the District of

Columbia, and (b) that the defendant has not been properly served with process in this action.

2. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this Court is invoked solely on the ground that the action arises under the laws of the United States, and (b) the defendant is a corporation incorporated under the laws of the State of North Carolina, is an inhabitant thereof, transacts business and is to be found therein.

As further grounds for the above Motions, the Court's attention is respectfully directed to the facts recited in the affidavit of J.G. Pennington, Secretary, Thomasville Chair Company, annexed hereto as Exhibit A, and to defendant's Memorandum of Points and Authorities attached hereto and made part hereof.

/s/ Raymond S. Smethurst
Attorney for Defendant

[Filed December 2, 1959]

NOTICE OF MOTION

To: Harry E. Taylor, Jr., Esquire

You are hereby notified that under the rules of this Court you have Five (5) days within which to respond to this Motion.

/s/ Raymond S. Smethurst
Attorney for Defendant
Thomasville Chair Company

[Certificate of Service]

[Filed December 2, 1959]

AFFIDAVIT IN SUPPORT OF MOTION (1) TO QUASH SERVICE OF
PROCESS OF COMPLAINT, AND (2) TO DISMISS SAID COMPLAINT

STATE OF NORTH CAROLINA	)	
	)	ss.
COUNTY OF DAVIDSON	)	

J. G. PENNINGTON, being first duly sworn, deposes and says that he is Secretary of Thomasville Chair Company, a corporation duly

organized and existing under the laws of the State of North Carolina and having its principal office and place of business at Thomasville, North Carolina; that he is duly authorized to make the following statement; and that by reason of his custody of certain reports and records of said corporation, he is familiar with the facts as hereinafter set forth.

Deponent further says that Thomasville Chair Company is engaged in the manufacture of wood household furniture in plants all located at Thomasville, North Carolina; that said furniture is sold to wholesalers and retailers throughout the United States pursuant to orders placed at various furniture markets or exhibits held in various parts of the United States, at the Corporation's showroom in Thomasville, North Carolina, by telephone, mail or telegram or placed with its thirty-eight independent travelling sales representatives throughout the United States.

Deponent further says that household furniture manufactured by Thomasville Chair Company is sold to department stores and furniture retailers within the District of Columbia upon orders placed at the Corporation's showroom at Thomasville, North Carolina, at other furniture markets held in other parts of the United States, upon orders received by telephone, telegraph or mail or by its one sales representative whose territory includes the District of Columbia.

Deponent further states that Thomasville Chair Company has one sales representative whose territory includes portions of the State of Virginia, portions of the State of Maryland, and the District of Columbia; that said sales representative is an independent agent and not an employee of Thomasville Chair Company; that all orders placed with said sales representative are subject to approval and acceptance by the Corporation offices at Thomasville, North Carolina, and that said sales representative has no authority to approve such orders or to enter into any contracts on behalf of said Corporation.

Deponent further states that all furniture sold by Thomasville Chair Company to customers within the District of Columbia is delivered to independent carriers at Thomasville, North Carolina for

shipment F.O.B., Thomasville, North Carolina at the expense of the buyer and that all payments for such furniture sold are remitted by customers within the District of Columbia to the Corporation at Thomasville, North Carolina.

Deponent further says that the Corporation does not make or enter into contracts of any nature in the District of Columbia; that the Corporation maintains no bank account in the District of Columbia; that no funds of the Corporation are received or disbursed in the District of Columbia; and that the Corporation has no offices, employees or agents and maintains no manufacturing, warehouse or other facilities in the District of Columbia, and makes no deliveries or installations or performs any service work on any of the Corporation's products sold to customers in the District of Columbia.

Deponent further says that the Corporation is not registered, nor has it been requested or required to register or otherwise qualify in any other state or the District of Columbia as a foreign corporation engaged in or transacting business in any such state or the District of Columbia.

/s/ J. G. Pennington, Secretary
Thomasville Chair Company

SEAL (Of Thomasville Chair Company)

[Jurat dated November 24, 1959]

[Filed December 9, 1959]

**POINTS AND AUTHORITIES IN OPPOSITION
TO MOTIONS TO QUASH AND DISMISS**

1. Defendant's pleadings go beyond objection to the jurisdiction of the Court and constitute a general appearance by defendant, Thomasville Chair Company.

Manning v. Furr, 66App. D.C., 281, 282
66 F.(2d) 807

"It is elementary that: "A defendant appearing specially to object to the jurisdiction of the court must, as a general rule,

keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived the objection." 4 C.J. 1318.

2. Defendant over many years has sold furniture within the District of Columbia and collected many thousands of dollars therefor, and as a result is doing business within the District of Columbia.

Frene et al. v. Louisville Cement Co.
77 U.S. App. D.C. 129, 134 F.2d 511

TAYLOR & WALDRON

By /s/ Harry E. Taylor, Jr.
Attorneys for Plaintiff

[Certificate of Service]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

December 14, 1959

Washington, D. C.

The above-entitled matter came on for hearing on motion before THE HONORABLE RICHMOND B. KEECH, a United States District Judge, at 11: 50 A.M.

* * * *

5

THE COURT: Is not the rule that the solicitation alone is not sufficient?

MR. SMETHURST: That is my understanding, that it is not. It is the solicitation plus.

THE COURT: Yes.

* * * *

9

MR. TAYLOR:

* * * *

Now our courts have never liked that solicitation clause rule and in the Frene versus Louisville Cement case, the court banged away at the rule and said: Well, this just isn't right. You ought to be able to hold these people if they just solicit in the District of Columbia.

But it said, it is not necessary to take the final step in repudiating in this case, indicating that if they had to they may have.

THE COURT: I do not get much comfort out of that. They left it as it was.

* * * *

10 THE COURT: Let me interrupt you so you can help me, sir. What have you shown in the pleadings which are now before me which shows this man was doing more than mere solicitation?

MR. TAYLOR: Your Honor, I have the manager of Curtis Brothers, Inc. here today and the reason that I wanted to put on this testimony, I noticed in the Frene case that they had taken testimony on that particular point and I wanted to proffer it to you.

THE COURT: Have you filed any affidavit in this case?

MR. TAYLOR: No, and Your Honor, the reason that I have not filed an affidavit in this case is that I have never seen a motion come up quite as fast as this. * * *

12 THE COURT: Now there is no affidavit in here. Actually what you are asking me for is a continuance.

MR. TAYLOR: Well either that, Your Honor, more time for me to get my affidavit in or else to put on the live testimony which I have here, Your Honor.

THE COURT: I looked for the card and the card makes no notation of any request for taking testimony, and particularly if it had, it would not have come here because this is Motions Court Number One.

MR. TAYLOR: Well, Your Honor, actually I felt that I could-- the testimony would take actually less time than arguing it because it is just a short thing. Your Honor, from the record yourself you can see that there is this--

THE COURT: I cannot see it because my recollection of the law was as I attempted to state it, but with poor language is that under
13 our rule of law in the District of Columbia for transacting business there has to be solicitation plus. I think you recognize the basic principle and are saying as a factual matter you have such

information.

MR. TAYLOR: Yes, Your Honor, and I ask the Court--you have the discretion to grant one of the two things that are most important to me. One, is either to take a few minutes testimony or two, to give me enough time to file the testimony that I am going to give in affidavit form.

THE COURT: I could not do that at this time. I do not think it would be fair to the other side because they have no right to expect that a hearing would take place on oral testimony today.

* * * *

14 MR. TAYLOR:

Well, Your Honor, if I had filed an affidavit on Friday he would have been almost in the same position.

THE COURT: No, he would not have, because I would have read it before I came in here, as I do in all of these things provided they are gotten in on time. I read the rest of them and I would have read yours too.

What do you say about the opportunity to file an affidavit in this case?

MR. SMETHURST: Your Honor, my normal position would be not to contest it. This case, however, has been pending on the docket
15 of this court since January 1958. Ten efforts have been made by the issuance of a summons to find this defendant. It is perfectly logical why the defendant could not be found because they are not in the District of Columbia. And during that time they have been subjected to a lot of harrassing in the trade press about this treble damage action. It has cast a reflection on them. I would object to any delay in the disposition of it at this stage.

* * * *

16 THE COURT: It does not do any good to get them into court unless it is the right court.

* * * *

MR. TAYLOR: * * * Now that indicates that Congress says

in these kind of cases you can bring a suit here in the District of Columbia, and have the marshal in Thomasville serve it upon them.

THE COURT: I do not understand that. I understand that to say if they are doing business here in this jurisdiction, solicitation plus, then they would be amenable under that Act.

* * * *

17 THE COURT: I do not think that is applicable. It seems to me that the whole question here is pitched on the fact if the service is right here then you are in the right venue, probably. If the service is not right here then you are not in the right venue. At least that is the way it seems to me.

MR. TAYLOR: Yes, Your Honor, and I think service is right here if we can show solicitation plus and I say that I have done the best, under the circumstances, that I could so to be prepared to show solicitation plus without asking for a continuance, Your Honor. And if you will allow me to put, what I have represented I can put, into an affidavit before you rule, Your Honor--

THE COURT: When could you have that in?

MR. TAYLOR: I will do it this afternoon, Your Honor, and I will file it in the morning.

MR. SMETHURST: May I point out one detail here?

THE COURT: Yes.

MR. SMETHURST: From Mr. Taylor's recital of the evidence that he would expect to get here. Presumably it deals with--

THE COURT: Let me interrupt you to say this.

MR. SMETHURST: Yes, sir.

18 THE COURT: I am not going to try to say what he said would be sufficient, satisfactory, or not and I do not think you better speculate it either as to what he is going to say. I think if he will get--go ahead, sir.

MR. SMETHURST: I simply wanted to say that the individual he is talking about is not an employee and as a matter of law, I do not think it makes any difference as to whether he got service on this

Sam Harris we are talking about.

THE COURT: You were put on notice of that fact?

MR. SMETHURST: So that we could determine whether he is doing business in the jurisdiction for the company. I have cases here to show, Your Honor, that even if Sam Harris were served, it would not be effective service in the District of Columbia.

THE COURT: Meaning what?

MR. SMETHURST: So what I am saying is that we may be taking time and the total result is not going to effect the outcome. I do not see the validity of it.

THE COURT: I think I will do this: I think I will grant the motion to quash and dismiss with leave to file a motion for reconsideration in the matter. I think then it puts the onus on you to come forward with something to show the situation and it will not be the vehicle of delay. So I will take your order granting the motion to quash and the motion to dismiss subject to a motion for reconsideration and if you
19 have appropriate facts in law it can be dealt with at that time.

[Filed December 16, 1959]

ORDER

Upon consideration of defendant's Motion to Quash Service of Process and defendant's Motion to Dismiss Complaint, and after argument of counsel, it is by the Court this 16th day of December, 1959,

ORDERED that defendant's Motion to Quash Service is hereby granted, and it is further

ORDERED that defendant's Motion to Dismiss Complaint is hereby granted, and it is further

ORDERED that plaintiff be permitted to file a timely Motion for reconsideration of the above rulings.

/s/ RICHMOND B. KEECH
District Judge

No Objection: /s/ Harry E. Taylor, Jr.
Attorney for Plaintiff

[Filed December 17, 1959]

MOTION FOR RECONSIDERATION
OF MOTIONS TO QUASH AND DISMISS

Now comes Harry E. Taylor, Jr., Attorney for Curtis Bros. Inc., plaintiff herein, and moves the Court to reconsider its ruling to dismiss the complaint filed herein and as grounds therefor says:

1. That immediately upon service of a copy of the Motion to Quash Service and Motion to Dismiss with the affidavit and memorandum in support thereof upon the attorney for plaintiff herein, a call was made to New York Counsel of Counsel who has in its file certain documents said attorney felt should be available in order to prepare an affidavit in proper answer to the motions filed by defendant.
2. That said attorney filed an opposition on or about December 8, 1959, and this matter was set for hearing on December 14, 1959.
3. That on December 10 and 11, 1959, said attorney was engaged in an emergency hearing on a temporary restraining order and injunction against a small hospital represented by said attorney, and when it became obvious said attorney could not possibly obtain the necessary information and prepare a sufficient affidavit to answer the motions filed by the defendant, in desperation at the time of the hearing said attorney presented the General Manager of the plaintiff as a witness to testify in lieu of an affidavit.
4. That upon the Court's refusal to take testimony counsel represented that an affidavit could be filed within twenty-four hours, and although the Court contemplated granting plaintiff this leave, the Court finally dismissed the complaint.
5. That immediately said attorney prepared an affidavit, which is attached hereto and made a part hereof, which is sufficient to prevent a dismissal of the complaint.
6. That said attorney knowing the objection to delay in litigation had brought a live witness into Motions Court rather than to ask for a continuance, although under the circumstances a continuance might well have been justified.

7. That the matter before the Court involves a new provision of the D.C. corporation law known as the "Substantive Changes Act of 1959" and it may well be that in fairness to both sides testimony should be taken to determine whether or not the plaintiff's motions should be granted.

WHEREFORE the premises considered attorney for the plaintiff prays that the Court:

1. Reconsider its order quashing service and dismissing the complaint and reinstate the complaint for further proceedings;
2. That the Court direct that testimony be taken to ascertain whether or not the defendant was engaged in solicitation plus within the District of Columbia so as to give this Court jurisdiction;
3. That the Court reinstate the complaint and grant the plaintiff sufficient time to direct written interrogatories to the defendant bearing on the duties of Sam Harris;
4. That the Court grant the plaintiff such other and further relief as may seem just in the premises.

TAYLOR & WALDRON

By /s/ Harry E. Taylor, Jr.
Attorneys for Plaintiff

[Certificate of Service]

[Filed December 17, 1959]

AFFIDAVIT OF CHARLES W. CURTIS

DISTRICT OF COLUMBIA) to wit:

CHARLES W. CURTIS being first duly sworn under oath deposes and says that he has been employed by Curtis Bros. Inc., plaintiff herein, hereafter called Curtis, for ten years and at present is General Manager of the Curtis Bros. furniture store located at 2041 Nichols Avenue, S.E., Washington, D.C.; that said store has transacted business with the defendant, Thomasville Chair Company, hereafter called Thomasville, for at least fifteen years; that during this period until a

dispute between the parties hereto over unfair pricing practices engaged in by Thomasville in the District of Columbia, one Sam Harris was employed by Thomasville Chair Company and as a representative thereof made calls upon Curtis in the District of Columbia approximately every two weeks; that the name Sam Harris appeared on the sales invoices used by Thomasville in billing Curtis during the period in which the parties transacted business together in the District of Columbia; that Sam Harris lives in Thomasville, North Carolina, where the plant of Thomasville is located, and said Sam Harris is closely connected with the Finch family, who operate Thomasville, both business-wise and socially; that when Curtis had any complaints or questions concerning the condition, delivery, prices, advertising or other matters concerning Thomasville products except payments due for merchandise, such matters were taken up directly with Sam Harris on his regular calls into the District of Columbia or by phone to his home in Thomasville, North Carolina; that such calls if made to the Thomasville factory were as a matter of course referred to Sam Harris; that whenever a retail customer of Curtis complained about the finish, construction or any defect existing in a piece of Thomasville furniture sold by Curtis, a report was made to Sam Harris who on his next trip into the District of Columbia would personally inspect the defective merchandise in the home of the Curtis customer and decide whether or not a replacement by Thomasville was justified; that in addition to obtaining orders for Thomasville furniture, Sam Harris would give Curtis advice and assistance in arranging the Thomasville line for displays; that in rendering this assistance Sam Harris would remove his coat and personally take charge of placing the Thomasville line of furniture into displays which he felt would promote the retail sale thereof; that Sam Harris gave advice to Curtis on the type of newspaper advertising he felt would most effectively promote the retail sale of the Thomasville line; that where customers within the District of Columbia who bought from Thomasville at wholesale did not operate in a manner approved by Sam Harris he was able by control of delivery and quantity to put such customers at a

competitive disadvantage; that Sam Harris had control over price and mark-up for the Thomasville line and could give lower wholesale prices to certain favorite customers in the District of Columbia and conceal this fact from customers not granted favored treatment; that Sam Harris always represented himself to be an employee and representative of Thomasville rather than an independent agent in business for himself; that Sam Harris was in fact a manufacturer's representative and salesman for Thomasville; that said manufacturer's representatives are customary in the furniture business and all of them have duties and render services in addition to the mere solicitation of orders; that Thomasville sells approximately one million dollars worth of furniture at wholesale prices in the Washington metropolitan area each year; that Curtis placed most of its orders for merchandise directly with Sam Harris and in the exceptional cases where merchandise was ordered otherwise Sam Harris received credit for its sale and was paid a commission by Thomasville for such sales; that Curtis was not in the practice of placing orders at the market or by phone but through Sam Harris; that until Sam Harris became aware of this proceeding on the day it was filed or shortly thereafter, he was in the District of Columbia approximately every two weeks and made calls upon Curtis and the other customers of Thomasville; that since this suit has been pending and in order to avoid service of process Sam Harris has given up staying at Dupont Plaza Hotel within the District of Columbia where he was a guest for many years on his trips into the District of Columbia as a representative of Thomasville prior to this proceeding; that since this action was filed Sam Harris has been staying at the Marriot Motor Hotel in Virginia or the Intown Motor Hotel in Silver Spring, where he has been able to continue his various services to the Thomasville customers by darting in and out of the District of Columbia without exposing himself to service of process of this Court; that since the filing of this suit Sam Harris in order to avoid service has not remained within the District of Columbia for a period of time sufficient for the defendant to obtain service of process upon him; that the wrong for which Curtis seeks damages from

Thomasville took place within the District of Columbia as a result of the conduct of Sam Harris with the full knowledge, consent and approval of Thomasville; that the evidence required to prove said damages is within the District of Columbia, being the records of the favored customers, competitors of Curtis, who have received discriminatory discounts from Thomasville through Sam Harris, and any records of Thomasville necessary to defend this action will be on file with the Federal Trade Commission within the District of Columbia as a result of an investigation and pending proceedings against Thomasville by the Federal Trade Commission; that Sam Harris rendered substantially the same service to all of Thomasville customers in the District of Columbia and continues to do so to this day; that Sam Harris not only assisted customers in the District of Columbia by filling orders for merchandise to be delivered in the future, but he was also engaged in promoting sales of merchandise already sold, delivered and in stock of Curtis and other customers; that Sam Harris was never merely a representative for solicitation only, but had the power to act for the company within the District of Columbia as though he were an officer, stockholder, or top level management employee.

/s/ Charles W. Curtis

[Jurat dated December 14, 1959]

[Filed December 23, 1959]

**OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDERS
QUASHING SERVICE AND DISMISSING COMPLAINT**

Plaintiff's Motion to Reconsider should be denied for the reason:

1. The Motion and Affidavit fail to establish error in the action of this Court granting defendant's Motions to Quash and dismiss;
2. The Motion and Affidavit fail to establish that defendant is "transacting business" in the District of Columbia within the meaning of Title 29, D. C. Code Sec. 933i(b);
3. The Motion and Affidavit fail to establish that defendant

"resides or is found, or has an agent" within the District of Columbia within the meaning of Section 4 of the Clayton Act (15 U.S.C. Sec. 15).

As further grounds, the Court's attention is respectfully directed to the facts recited in the Affidavit of Sam Harris and the Affidavit of Thomas A. Finch, Jr., annexed hereto as Exhibits A and B, and to the attached Memorandum of Points and Authorities.

/s/ Raymond S. Smethurst
Attorney for Defendant

[Certificate of Service]

[Filed December 23, 1959]

AFFIDAVIT OF THOMAS A. FINCH, JR.

Thomas A. Finch, Jr., being first duly sworn on oath deposes and states that he is Executive Vice President of Thomasville Chair Company and that he is a resident of Thomasville, North Carolina; that he has read a copy of an affidavit dated December 14, 1959, purportedly executed by Charles W. Curtis, General Manager, Curtis Brothers, Inc. of Washington, D. C., and that he is familiar with the matters recited in that affidavit and with the activities which that affidavit attributes to Thomasville Chair Company, and/or Sam Harris, a sales representative of Thomasville Chair Company.

Deponent further states that pursuant to the policy and practice of Thomasville Chair Company, neither Sam Harris nor any other sales representative of the company have authority to handle complaints or questions concerning prices, discounts, delivery dates, defective or damaged merchandise, that such complaints, pursuant to published procedures of the company, can be handled and disposed of only by authorized persons in a regular department set up for that purpose in the Thomasville office at Thomasville, North Carolina.

Deponent further states that an examination of the file of correspondence and complaints from Curtis Brothers, Inc., for the year of 1956, the last year in which normal business relations existed,

discloses that complaints over defective merchandise and questions concerning delivery dates, credits, and order changes were submitted in letter or memorandum form from Curtis Brothers, Inc., directly to the factory in accordance with established procedures and not through Sam Harris, Thomasville's sales representative.

Deponent further states that the sales representative of Thomasville Chair Company in the District of Columbia is not trained, nor in his judgment, qualified, to advise customers of Thomasville Chair Company on advertising matters or on the display of furniture on their showroom floor; that he has never previously been informed that such services had been rendered, and upon information and belief, does not believe such services were performed by Sam Harris, while employed by or on behalf of Thomasville Chair Company.

Deponent further states that Sam Harris has no authority, function or responsibility to engage in promoting or in assisting customers of Thomasville Chair Company in promoting the sale of Thomasville products to the ultimate consumer; that he has no knowledge that any such assistance or service has ever been performed or offered by Sam Harris, and on the contrary, upon information and belief, denies that such services are, or have been performed by Sam Harris for Curtis Brothers, Inc., or for any other customers in the District of Columbia.

Deponent further states that its sales representatives, including Sam Harris, have no authority or responsibility except the solicitation of orders from furniture wholesalers and retailers, that all such orders are subject to acceptance and approval at Thomasville, North Carolina, and that such sales representatives have no authority, in any respect, to act for, bind or commit Thomasville Chair Company in any matter or manner whatsoever.

/s/ Thomas A. Finch, Jr.
Executive Vice President
Thomasville Chair Company

[Jurat dated December 21, 1959]

[Filed December 23, 1959]

AFFIDAVIT OF SAM P. HARRIS

SAM F. HARRIS, being first duly sworn, deposes and says that he resides at Erwin Heights, Thomasville North Carolina; that he is a sales representative of Thomasville Chair Company of that city; that his sales territory includes the District of Columbia, and that for many years he did solicit orders from Curtis Brothers, Inc. of Washington for Thomasville Chair Company.

Deponent further states that during the period he has represented Thomasville Chair Company he has never had, nor has he represented that he had, any authority or control over the adjustment of customer complaints or questions concerning conditions, delivery, prices, advertising or other matters concerning Thomasville products; that all such complaints or questions; whenever raised by Curtis Brothers, Inc., were taken up with the factory by Curtis Brothers, Inc., directly.

Deponent further states that only on one occasion did he ever visit the home of a customer of Curtis Brothers or any other District of Columbia customer of Thomasville Chair Company, to inspect merchandise claimed to be defective, and on that one occasion he did so only at the request of Curtis Brothers, Inc., and in company with a representative of that store.

Deponent further states that he is not qualified to give and does not give advice on advertising matters to customers of Thomasville, and has never offered or given any such advice to Curtis Brothers, Inc., or to any other customer of Thomasville Chair Company, that he did not and has not assisted Curtis Brothers, Inc., or any other customer of Thomasville Chair Company in arranging or placing Thomasville products on their floor for display purposes. That he has no other duties and performs no other services on behalf of Thomasville Chair Company within the District of Columbia other than the solicitation of orders according with the price list, terms of sale, and delivery dates fixed by the Company, and all of such orders are subject to acceptance

or approval by the Company at Thomasville, North Carolina.

Deponent further states that on his trips to Washington, D. C. and to nearby Maryland and Virginia he has continued in 1958 and 1959 to stay at the DuPont Plaza Hotel whenever space was available. That he has never stayed at the Intown Motor Hotel in Silver Spring, Maryland, and has stayed at the Marriot Motel only when calling on accounts in Northern Virginia or when hotel space could not be obtained in Washington.

Deponent says that he has no authority or responsibility for filling orders taken by him, that he did not promote or assist in any way in promoting the sale of furniture at retail by any customer of Thomasville Chair Company in the District of Columbia or elsewhere, and that he has no authority to act for, commit or bind Thomasville Chair Company in any manner whatsoever.

/s/ Sam P. Harris

[Jurat Dated December 18, 1959]

[Filed January 7, 1960]

AFFIDAVIT OF HARRY E. TAYLOR, JR., IN SUPPORT
OF MOTION FOR RECONSIDERATION OF MOTIONS TO
QUASH AND DISMISS

DISTRICT OF COLUMBIA, ss:

Harry E. Taylor, Jr., attorney for the plaintiff, being first duly sworn under oath deposes and says that attached hereto and made a part hereof as plaintiff's Exhibits Nos. 1, 2, 3 and 4, are respectively an order form used by defendant dated October 31, 1955, a customer's acknowledgment form used by the defendant dated November 7, 1955, an invoice form used by the defendant dated April 12, 1956, and a letter dated March 5, 1956, from the defendant to the plaintiff; all of said Exhibits were taken from the plaintiff's files and are records used in the regular course of business between the plaintiff and the defendant; that defendant has continued to do business in the same manner in the District of Columbia until the present date; that notwithstanding the

affidavits filed by the defendant herein its business records show that Harris, who is the same Harris described in the affidavit of Charles W. Curtis attached to the Motion for Reconsideration of Motions to Quash and Dismiss now pending in this case, was and is a salesman working for the defendant and the defendant recognized the said Harris as a part of its organization and used him for purposes other than solicitation in connection with the defendant's business transacted within the District of Columbia.

/s/ Harry E. Taylor, Jr.

[Jurat dated January 7, 1960]

[Certificate of Service]

EXHIBIT NO. 1

THOMASVILLE CHAIR COMPANY

Factories and
General Office
Thomasville
"The Chair Town"

Makers of
Character
Furniture

Permanent Exhibit
Chicago

Telephone 2711
Thomasville, N. C.

Order No.:

Date: 10-31-55

Ship to: Curtis Bros Furniture

At: 2041 Nichols Ave., Washington, D. C.

Via: Truck

When: Ready Feb.

Terms: 2% 30, net 60, F.O.B. Thomasville Salesman: Harris

Quan.	Factory Number	Article, Description, etc.	Finish Cover	Price Ext.
~~2~~	~~366-3~~	~~Dresser~~	~~Maple~~	~~67.50~~
~~4~~	~~-4~~	~~D. Dresser~~	~~-~~	~~92.50~~
~~1~~	~~2~~	~~Chest Mirror~~	~~-~~	~~17.50~~
~~4~~	~~-10~~	~~Chest~~	~~-~~	~~62.50~~
~~2~~	~~-11~~	~~Chest on Chest~~	~~-~~	~~74.00~~
~~6~~	~~-6~~	~~Bed 4' 6'~~	~~-~~	~~39.75~~
~~2~~	~~-7~~	~~Bookcase Bed 4' 6'~~	~~-~~	~~46.00~~
~~1~~	~~-8~~	~~Desk - Vanity~~	~~-~~	~~52.50~~
~~6~~	~~-12~~	~~N. Stand~~	~~-~~	~~26.25~~

All orders subject to acceptance of main office

W.P.

Feb
Move to
back to

THOMASVILLE CHAIR COMPANY

and

FINCH FURNITURE COMPANY

(Division of Thomasville Chair Company)

Bedroom, Dining Room and Living Room Furniture

Thomasville, N. C.

Makers of
Character
Furniture

11-7-55

Order No. 96205

Ship to:

Address:

Date of Order: 10-31-55

This is a copy of your order as we have entered same on our books. It is not subject to cancellation except by our mutual consent. If incorrect in any particular please advise us immediately.

Invoice to: Curtis Bros Furn Co
2041 Nichols Ave
Washington D C

Shipping date:

Salesman: Harris

Terms: 2%, 30 Net 60 F.O.B. Factory

Quantity	Suite No.	Article	Finish or Color	Price
2	360-3	Dresser	Maple	67.50
4	360-4	Dresser		92.50
1	360-2	Mirror		17.50
4	260-10	Chest		62.50
2	360-11	Chest		74.00
6	360-6	Bed		39.75
2	360-7	Bed		46.00
1	360-8	Vanity		52.50
6	360-12	N. Stand		26.25
FEB TRUCK				

move back to April letter of See 2/7/56 CWC

Customer's Acknowledgment

* * *

THOMASVILLE CHAIR COMPANY

Makers of
Character
FurnitureBedroom, Dining Room
and Living Room Furniture

No. 92344

Sold to: Curtis Brothers
Furniture Company
2041 Nichols Avenue
Washington, D. C.Thomasville, N. C.
Date: April 12, 1956
Customer's
Order No.: 10-31-55
Salesman: Harris
Terms: 2% - 30 Net 60
F.O.B. Factory

We will expect settlement according to this invoice, which, if incorrect, must be returned for alteration at once.

Quantity	Suite-Number	Finish or Color	Article	Amount	
2 ✓	360-3	Maple	Dresser	67 50	X 135 00
4 ✓	360-4	"	Dresser	92 50	X 370 00
1 ✓	360-2	"	Mirror	17 50	X 17 50
4 ✓	360-10	"	Chest	62 50	X 250 00
2 ✓	360-11	"	Chest	74 00	X 148 00
6 ✓	360-6	"	Bed	39 75	X 238 50
2 ✓	360-7	"	Bed	46 00	X 92 00
1 ✓	360-8	"	Vanity	52 50	X 52 50
6 ✓	360-12	"	N Stand	26 25	X 157 50
					X 1461 00

Cash Discount of 2% allowed only if paid by May 12 1956

Goods returned without our authority will not be accepted by us. We are not responsible for loss or damage in transit as all pieces are delivered to the transportation company in good order.

EXHIBIT NO. 4

THOMASVILLE CHAIR COMPANY

Makers of
Character
FurnitureThomasville, N. C.
March 5, 1956Curtis Bros. Furniture Co.
2041 Nichols Avenue
Washington, D. C.

Gentlemen:

In reply to a request by our Mr. Harris we have cancelled two
836-11 buffets, two no. 836-44 tables, four no. 836-1 buffets and

three no. 836-190 chinas from your order given to Mr. Harris on October 31st.

We regret that these pieces had to be cancelled and assure you of our desire to serve you efficiently.

Very truly yours,
THOMASVILLE CHAIR COMPANY
/s/ K. F. Huffman
Shipping Department

cc: Sam Harris
KFH/cl

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
January 15, 1960.

The above-captioned cause came on for hearing of motion before the HONORABLE RICHMOND B. KEECH, Judge, United States District Court for the District of Columbia.

APPEARANCES:

On behalf of the Plaintiff:

HARRY E. TAYLOR, JR., ESQ.

On behalf of the Defendant:

RAYMOND S. SMETHURST, ESQ.

* * * * *

5 THE COURT: That is where you and I may not be understanding each other correctly. I hope I wasn't indicating to you that I was just going to go through the formality of quashing the service and then re-considering it.

MR. TAYLOR: Well, the statement you made, your Honor, you thought it was better to put the onus of going forward on the plaintiff, rather than to give me the 24 hours that I told the Court I would require to file the affidavit.

THE COURT: In other words, actually what I did was to grant

the motion to quash on the ground that there wasn't sufficient before me to deny that motion, and you justified the absence of it, or attempted to, by stating that you hadn't been able to get supporting data therefor.

MR. TAYLOR: Well--

THE COURT: Now let me finish, please.

6 MR. TAYLOR: Yes, sir.

THE COURT: That is my recollection, and it is subject to correction, of course, because I have had a number of cases since. And at first I gave consideration to continuing it and then I felt there hadn't been diligence in the matter and I concluded that it would be better to put the onus on you, or your client, to come in and show why the matter should be reconsidered.

MR. TAYLOR: Yes.

THE COURT: And so I think what we have today is, first, the question as to whether or not there should be reconsideration; and if we conclude that there should be reconsideration, then we go to the merits of the motion.

Isn't that the status?

* * * *

13 MR. TAYLOR: Your Honor, when we argued this thing before, it was a question of whether we were able to show solicitation, plus, for the purpose of conferring jurisdiction--

THE COURT: Now, that is all that you have got to give me in justification of what you think constitutes a basis for reconsideration of this matter?

MR. TAYLOR: Well, no, your Honor.

THE COURT: Let's get all that you can give me on that and then we will move to the second segment.

* * * *

18 THE COURT: So actually what you are saying to me now is what you were seeking is not affidavits from New York, as I understood you originally to say, but you were seeking to get certain records which were kept as of 1955?

19 MR. TAYLOR: That is right, that were kept in Curtis and transferred there at the time that they came into this case as specialists in the antitrust field. And these records--they told me what they needed and we went through the records of Curtis Brothers and I sent all of those records to them at the time they were--

THE COURT: When did you request these, Mr. Taylor?

MR. TAYLOR: I requested them as soon as this motion arrived at my office, by telephone, your Honor. I called New York counsel.

THE COURT: All right.

MR. TAYLOR: And then when they didn't come and I was thrown out the last time I was here, I wrote them a letter and I told them I needed them and then they did come registered return mail and I have the date I received them in my office.

THE COURT: When were they received?

MR. TAYLOR: I have the envelope, but I don't have it here, your Honor.

THE COURT: All right, sir, what does the date show there?

MR. TAYLOR: Your Honor, I don't have the envelope.

20 THE COURT: All right, sir. Now, that constitutes the basis of your motion for reconsideration?

MR. TAYLOR: Yes, your Honor. ***

* * * *

25 THE COURT: Now, would you like to have Mr. Taylor finish his complete side of the case and then come back to you, sir, for your side?

MR. SMETHURST: I think so.

THE COURT: All right. Now, then, we have finished one segment. We come to the second.

Now, if in the event there be a reconsideration granted, you feel that the merits which you refer to now justify a denial of the request of the opposition?

MR. TAYLOR: Yes, your Honor.

THE COURT: All right, sir.

MR. TAYLOR: Your Honor, the first time I was before the Court on this question--

THE COURT: Now let's be sure--and excuse me for interrupting you, Mr. Taylor--I now understand that you are vested with such information that you deem essential to your determination of this case and it is in documentary form herein; is that right?

26 MR. TAYLOR: Yes, sir.

THE COURT: In other words, you sink or swim as to merits on those documents which you have lodged herein?

MR. TAYLOR: Yes, your Honor.

THE COURT: And we need nothing more?

MR. TAYLOR: Yes, your Honor.

THE COURT: All right. As to the merits, that is right as to the reconsideration of the transcript that you referred to?

MR. TAYLOR: Yes.

THE COURT: All right, sir.

MR. TAYLOR: Your Honor, in the District of Columbia there is the solicitation plus rule for the service of process against a non-resident corporation. Now, that rule applies when you are dealing with suits other than suits under the antitrust act.

Now, in the Frene case--

THE COURT: Excuse me, sir. Are you saying that that rule is not applicable to an antitrust case? I thought that was the one thing that we had an agreement on the last time.

* * * *

28 THE COURT: Now, what is the language there that gives you--

MR. TAYLOR: "It would seem, therefore, that the mere solicitation rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, and it is in this case."

* * * *

MR. TAYLOR: I am reading from page 134. And it says: "It constitutes in the practical sense both doing business and transacting business and should do so in the legal sense. Although the rule has

not been clearly and expressly repudiated by the Supreme Court, its
 29 integrity has been much impaired by the decisions which sus-
 tained jurisdiction wherever little more than mere solicitation is done."

* * * *

30 MR. TAYLOR: Now, this is district in which to sue corporation,
 which we have here. Now, there is no question Thomasville Company
 is a corporation. They admit it in their pleadings. And it says:
 "Any suit, action or proceeding under the antitrust laws against a cor-
 poration may be brought not only in the judicial district whereof it is
 an inhabitant but also in any district wherein it may be found or trans-
 acts business, and all process may be served in the district of which it
 is an inhabitant or wherever--"

* * * *

31 THE COURT: Where it is found or transacts business, did you
 say?

* * * *

33 MR. TAYLOR: I see. You are saying that you have to be an
 inhabitant and found in the jurisdiction?

THE COURT: It is one or the other.

Now, what constitutes found, if they not be an inhabitant?

* * * *

THE COURT: But what is necessary?

MR. TAYLOR: Continuing solicitation.

THE COURT: Plus, or just soliciting?

* * * *

34 THE COURT: Well, I thought you were going to give me a case
 which interpreted what found meant.

MR. TAYLOR: I will do that, your Honor.

"And we think it clear that, as applied to suits against corpora-
 tions for injuries sustained by violations of the Anti-Trust Act, its
 necessary effect was to enlarge the local jurisdiction of the district
 courts so as to establish the venue of such a suit not only, as thereto-
 fore, in a district in which the corporation resides or is 'found,' but

also in any district in which it 'transacts business'--although neither residing nor 'found' therein--in which case the process may be issued to and served in a district in which the corporation either resides or is 'found'."

THE COURT: Now, that case is what, sir?

MR. TAYLOR: This is Eastman Co. vs. Southern Photo Co. It is 273 and I am reading from page 372.

* * * *

35 THE COURT: So I am going to assume that you are going to indicate to me that your affidavits in this case will show the transaction of business in the District of Columbia.

MR. TAYLOR: Yes, your Honor.

THE COURT: Or solicitation plus in the District of Columbia.

MR. TAYLOR: Yes, your Honor.

THE COURT: Now, does that particular case say what does constitute transaction of business?

MR. TAYLOR: Well, if transaction of business is doing business, it says it was recognized.

THE COURT: Now, you say if.

MR. TAYLOR: Well, transacting business and doing business I think are the same.

THE COURT: Have you got any authority for that, sir?

* * * *

38 THE COURT: All right, sir.

"Be that as it may, it is clear that such an enlargement was made by Section 12 of the Clayton Act--dealing specifically with the venue and service of process in suits against corporations--under which the plaintiff proceeded in the present case. This provided that 'any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.'"

39 MR. TAYLOR: Yes.

THE COURT: Now I am back where I started from. What constitutes transacting business?

MR. TAYLOR: Solicitation. I think if you read on, your Honor, they will answer.

* * * *

41 MR. TAYLOR: No. But that case is still the law. And I would like to point out in the U.S. Code Annotated this point, your Honor, that the purpose of wide choice of venue given to plaintiffs in antitrust litigation is to further the interests of justice by enabling plaintiff to obtain redress in forums which they can afford to sue; and that is 85 F. Supp. 319.

* * * *

47 THE COURT: Now, Mr. Taylor, I am interrupting you because I am interrupting you in your own interest. Are you telling me that you have given me all the facts in this case on which you say that this defendant can be served and sued here?

MR. TAYLOR: Well, I haven't read to you the affidavit.

THE COURT: I am going to want the filament as well as your structure and I am going to want you to satisfy me, and I am giving this to you now because we are going to recess for lunch. I want you to satisfy me on what you think constitutes what is necessary in this jurisdiction, under this particular class of action, to permit service on a corporation in this type of action legally.

MR. TAYLOR: Yes.

THE COURT: And, two, what you say factually is shown by your affidavits or the pleadings herein which puts you in a position
48 where you have shown that the corporation is amenable to service here.

MR. TAYLOR: Yes, your Honor.

THE COURT: I think we will recess at this time.

I am saying that to you now because I am going to let you recapitulate when you come back. We are spending a lot of time, but I want to get the benefit of all that you have got.

* * * *

MR. TAYLOR: Your Honor asked me just before we recessed to tell the Court what I think transacting business means and then to try to fit my case into what I say it means. I think I will try to do that.

THE COURT: Now, when you say transacting business, I didn't mean to limit it to that. What I am looking for is the factual situation which you think justifies your staying here.

49 MR. TAYLOR: Yes, your Honor. Well, I am going to fit that factual situation to this term of transacting business.

THE COURT: In other words, you are saying to me that you believe the test here is whether or not this defendant was transacting business?

MR. TAYLOR: Yes, sir.

THE COURT: In other words, if it was transacting business in the District of Columbia, then you are all right; if he was not transacting business within the District of Columbia, then you are out?

MR. TAYLOR: That is right, sir.

THE COURT: Is that it?

MR. TAYLOR: That is it.

THE COURT: All right, sir.

* * * *

52 MR. TAYLOR: * *

And they are discarding for these process cases the solicitation plus. But even--

THE COURT: Before you leave that, what is your best authority for that statement, sir?

MR. TAYLOR: My best authority, your Honor, is the hint in the Frene case, 77 U.S. App. D.C.

THE COURT: All right.

MR. TAYLOR: And the Eastman Kodak case, where the Supreme Court--and I think that that shows the trend and I think that this Substantive Changes Act of 1959 shows that Congress also was trying to find a way to get process without having to go through the

solicitation plus routine.

THE COURT: Now, do you say that the Act itself does not define what transacting business means?

MR. TAYLOR: No, your Honor.

THE COURT: The 1959 Act doesn't?

MR. TAYLOR: No, your Honor, it doesn't; and the Court is going to have to do that in the light of what Congress intended.

THE COURT: Well, in the absence of an expression doesn't that leave it to whatever the law of this jurisdiction is at the time of enactment, and won't that be solicitation plus?

* * * *

53 THE COURT: Can I conclude that is energetic salesmanship
for the benefit of the principal as distinguished from the benefit of the
54 salesman?

* * * *

THE COURT: In this sense: I can't imagine any fellow who is working for a commission who isn't going to have to do more than sit down and say: Mr. Taylor, I represent Thomasville Chair Company, I want to get your order, what do you want? And stop.

MR. TAYLOR: That is what the dissent in the Frene case said, your Honor. I mean, they didn't go along with the majority rule in that case, but the majority rule said that naturally the salesman is going to get a bigger commission, but likewise the corporation is going to make
55 more sales. So the salesman can't benefit himself without benefitting the corporation that he represents, and since the corporation benefits from these energetic sales tactics, they are going to make the corporation subject to the jurisdiction of the court.

* * * *

56 THE COURT: Now you are saying to me that this long-time operation of this defendant here plus the amount of dollars which were taken in are certain things which make for solicitation plus?

MR. TAYLOR: Yes.

* * * *

57 THE COURT: Now, there isn't any challenge that Harris was a salesman, is there?

MR. TAYLOR: No, sir.

THE COURT: That is conceded.

* * * *

58 THE COURT: All right, sir.

MR. TAYLOR: But in delivery prices, advertising and other matters concerning Thomasville products and everything except the accounting part of it, if Curtis Brothers wanted to do business with Thomasville they would call Sam Harris in Thomasville, North Carolina, and tell him what their problem was; and in cases where they called the factory, the factory would say: Well, take that up with Sam Harris. And that appears in the affidavit.

THE COURT: Now, couldn't that be because this was his territory as a salesman for solicitation purposes?

* * * *

62 MR. TAYLOR: Well, I say this: that if your Honor should decide that you are going to quash the service because of the way it was served, now that I have one more way that I can try to bring this defendant before this Court and that I would like to have the opportunity to try that method so that then I will have done everything and the case will have covered all the possible means of bringing the defendant before the Court; and the reason I ask you to grant the motion for reconsideration is so that there won't be any question on the real legal issues of this case, and that is whether there has been such transacting of business as to make this service valid. And--

THE COURT: Now, what I really was asking you is, you say even though this service be improper here, that this action is appropriately filed?

MR. TAYLOR: Oh, yes, your Honor.

THE COURT: And that is for what?

MR. TAYLOR: Well, under Section 4 of the Clayton Act there is no question about the right of the plaintiff to sue in this court.

THE COURT: All right, sir.

MR. TAYLOR: I think I see what your Honor--

63 THE COURT: All I was saying is, I understood your approach to be that even if I hold that the service here be improper, it does not follow therefrom that the action should be dismissed, and you feel that the the action itself is valid notwithstanding what I may do as to the service.

MR. TAYLOR: Yes. For this reason, sir: Under Section 12 of the Clayton Act, that it says that any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the jurisdiction--judicial district whereof it is an inhabitant, but also any district wherein it may be found or transacts business. So if--

THE COURT: Now, you disturb me when you go back there because it would seem to me that under that language, if your premise be correct, you don't get in this Court properly, if I hold that the service is not proper; because isn't the validity of your action here dependent on a finding that the defendant was found here, or, two, transacted business here?

MR. TAYLOR: Yes, your Honor, unless the Court should say that under this Substantive Changes Act of 1959, that the service provided there for some reason except the Clayton Act.

64 THE COURT: You can't give me any specific language, can you?

MR. TAYLOR: It's just that we have served the Superintendent of Corporations in this case, and that act which authorizes that is a District of Columbia act and it doesn't specifically say that it covers antitrust cases. I know of no reason why it shouldn't, but I thought the Court might get to the point where they would say: Well, we are going to deny the motion to dismiss but quash the service of process, not because the defendant doesn't transact business in the District of Columbia but because we don't think that under the District of Columbia Corporation Act you can make service of this kind in antitrust cases.

I know of no--

THE COURT: I have lost you. I'm sorry, sir.

In other words, you say you are right here, your action is right here, and it is right under Section 12?

MR. TAYLOR: Yes.

THE COURT: And you say that they can bring in any--go into any district in which the corporation is what?

MR. TAYLOR: Transacting business.

THE COURT: Transacting business or is found.

MR. TAYLOR: Yes.

THE COURT: Now, you validate your service in this jurisdiction on the basis that this defendant is transacting business here?

65 MR. TAYLOR: Yes, sir.

THE COURT: Or is found here?

MR. TAYLOR: Yes, sir.

THE COURT: In either event, if that be true, you have got both service and you have got venue, haven't you?

MR. TAYLOR: Well, if I had served an agent of the corporation here or if I had served the process in Thomasville, North Carolina, as Section 12 provides, then there would be no question about it; but under this new Act, this Act of '59 that amended our local corporation law, it might be that that type of service, notwithstanding the fact the defendant transacts business here, isn't valid in an antitrust case. And I don't know why it shouldn't be but if--

THE COURT: Well, doesn't the actual Act of '59 to which you have referred me say if transacting--

MR. TAYLOR: Yes, if it transacts business.

THE COURT: So haven't we got the same terminology in both?

MR. TAYLOR: Yes, you have, but I don't know whether this Act was to apply to cases that arise under local laws, as distinguished from federal laws. And the point may be raised, some day they will say: Well, Congress intended this to be only in local cases and not cases involving federal statutes because in federal statutes you have
66 got to apply the federal law and the federal means of service

of process, and we are going to confine this to cases against foreign corporations that have damaged people in common law type actions or have violated District of Columbia laws, as opposed to federal statutes.

THE COURT: You are saying to me, actually, now, that even if I find that the defendant was transacting business in the District of Columbia, there is still--although you don't agree with it--open for consideration by me whether or not even in that event service on the Superintendent of Corporations of the District of Columbia is valid

* * * *

67 MR. SMETHURST:

* * * *

68 So that in effect he is now requesting the Court to permit him to take additional testimony to establish the fact of jurisdiction or the essentials of jurisdiction.

This is his law suit, your Honor. It was filed over two years ago. It has been sitting on the docket of the Court, as I argued here on the 14th of December. And even now he confesses that he does not have the facts on which to establish jurisdiction and he wants leave either through a reversal of the earlier action of this Court or by granting the motion to reconsider, to take further testimony or conduct a fishing expedition in the hope that he is going to uncover something that indicates that the defendant does more in the District than its officers have so sworn in their affidavits.

Now, along with his motion and those three prayers he has filed two affidavits, one by counsel, which contains three or four exhibits dated 1955 and 1956. The only materiality of those exhibits, as nearly as I can determine, is to establish that one Sam Harris is either an agent or a salesman of Thomasville Chair Company, the defendant. And that has been admitted from the first paper filed in the case by the defendant.

The second--

THE COURT: Admitted that he was an agent or salesman?

69 MR. SMETHURST: And/or. I am not going to argue which now.

* * * *

74 THE COURT: Let me ask you, were these antitrust cases?

MR. SMETHURST: No, this was a private action.

THE COURT: Rexall and the other one too?

MR. SMETHURST: Yes, your Honor. That was a private
action. * * *

* * * *

76 THE COURT: --but I am trying to get information from both
of you.

It has been indicated here that the statute might run or might
have run. Has it run in this case?

MR. SMETHURST: It is complicated, your Honor. I couldn't
answer that yes or no.

* * * *

77 MR. SMETHURST: * * *

So, just in conclusion, I would say that the plaintiff here has not
sustained his burden in establishing that the decision of the Court on

78 December 14 was in error, and that on the basis of the facts
then and now the defendant is not transacting business within the District
either for service under the Corporation Act or for jurisdiction under
Section 4 or 12 of the Clayton Act.

* * * *

OPINION OF THE COURT

THE COURT: I have heard counsel for the plaintiff and counsel
for the defendant at length in connection with a motion for reconsidera-
tion of motions to quash and dismiss which were granted by this Court
on the 16th of December, 1959.

I have concluded to grant the motion for reconsideration and
have reconsidered the motions to quash and to dismiss and memoranda
and supporting data, and have likewise considered legal arguments by
both counsel, together with affidavits and supporting data attached to
their pleadings.

As a result of my consideration of all this data, I conclude that

the motion to quash and the motion to dismiss should be granted.

I will take an order to this effect.

[Filed January 18, 1960]

ORDER

Plaintiff's Motion to Reconsider the Order of the Court dated December 16, 1959, granting defendant's Motion to Quash Service of Process and defendant's Motion to Dismiss Complaint came on for hearing on January 15, 1960. After argument of counsel, the Motion to Reconsider was granted. Thereafter, upon consideration of the affidavits filed in connection with the entire proceeding, and upon further argument of counsel, it is by the Court this 18th day of January, 1960,

ORDERED that the Order of December 16, 1959, granting defendant's Motion to Quash Service of Process and defendant's Motion to Dismiss Complaint, is affirmed.

/s/ RICHMOND B. KEECH
District Judge

Seen:

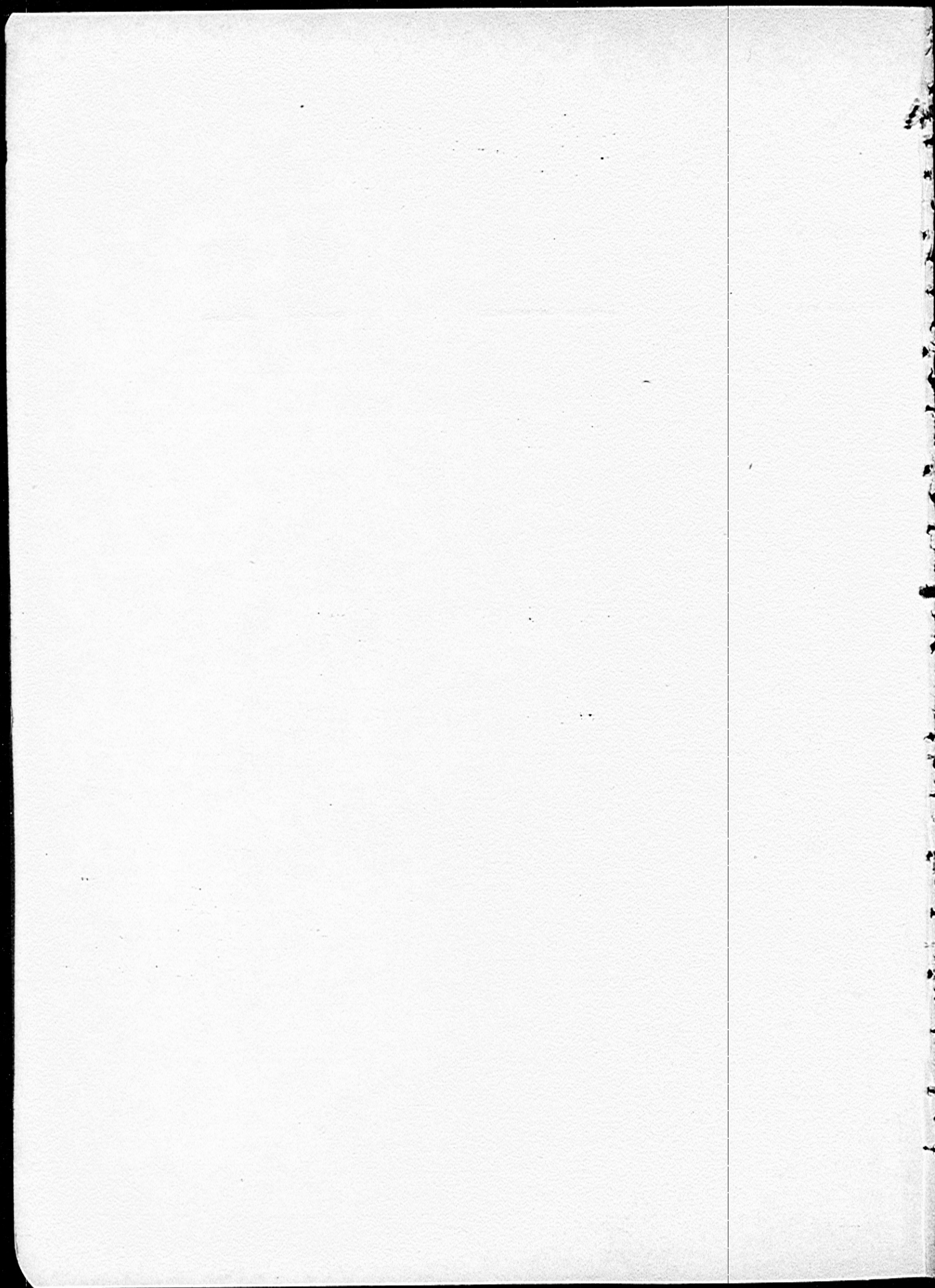
/s/ Harry E. Taylor, Jr.
Attorney for Plaintiff

[Filed February 4, 1960]

NOTICE OF APPEAL

Notice is hereby given this 27th day of January, 1960, that Curtis Brothers, Inc., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of January, 1960 in favor of Thomasville Chair Company against said Curtis Brothers, Inc.

/s/ Harry E. Taylor, Jr.
Attorney for Plaintiff



BRIEF FOR APPELLEE

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUN 17 1960

NO. 15, 671

Joseph W. Stewart
CLERK

CURTIS BROTHERS, INC.,

Appellant,

V.

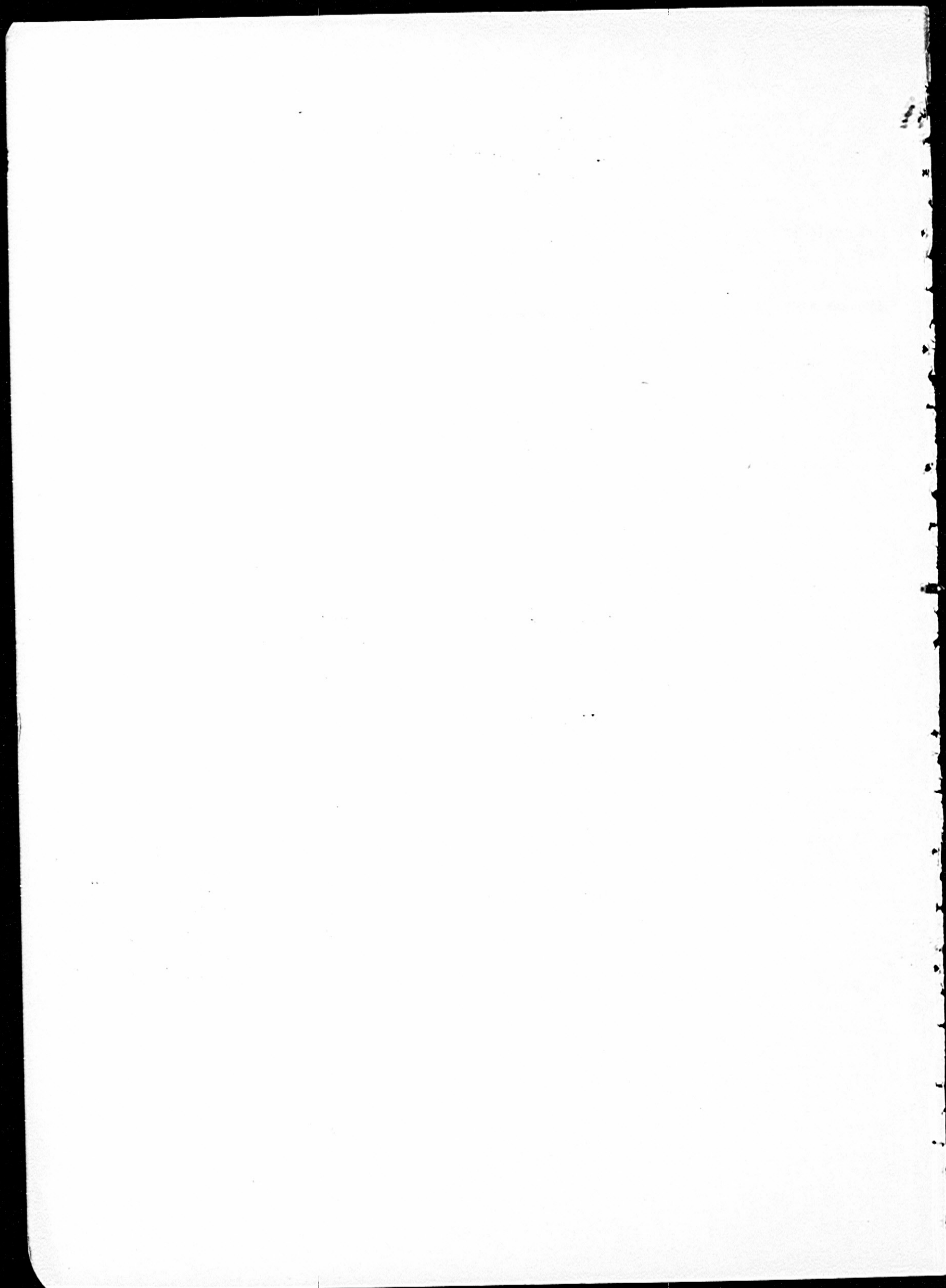
THOMASVILLE CHAIR COMPANY,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

**RAYMOND S. SMETHURST,
1511 K Street, N. W.,
Washington 5, D. C.**

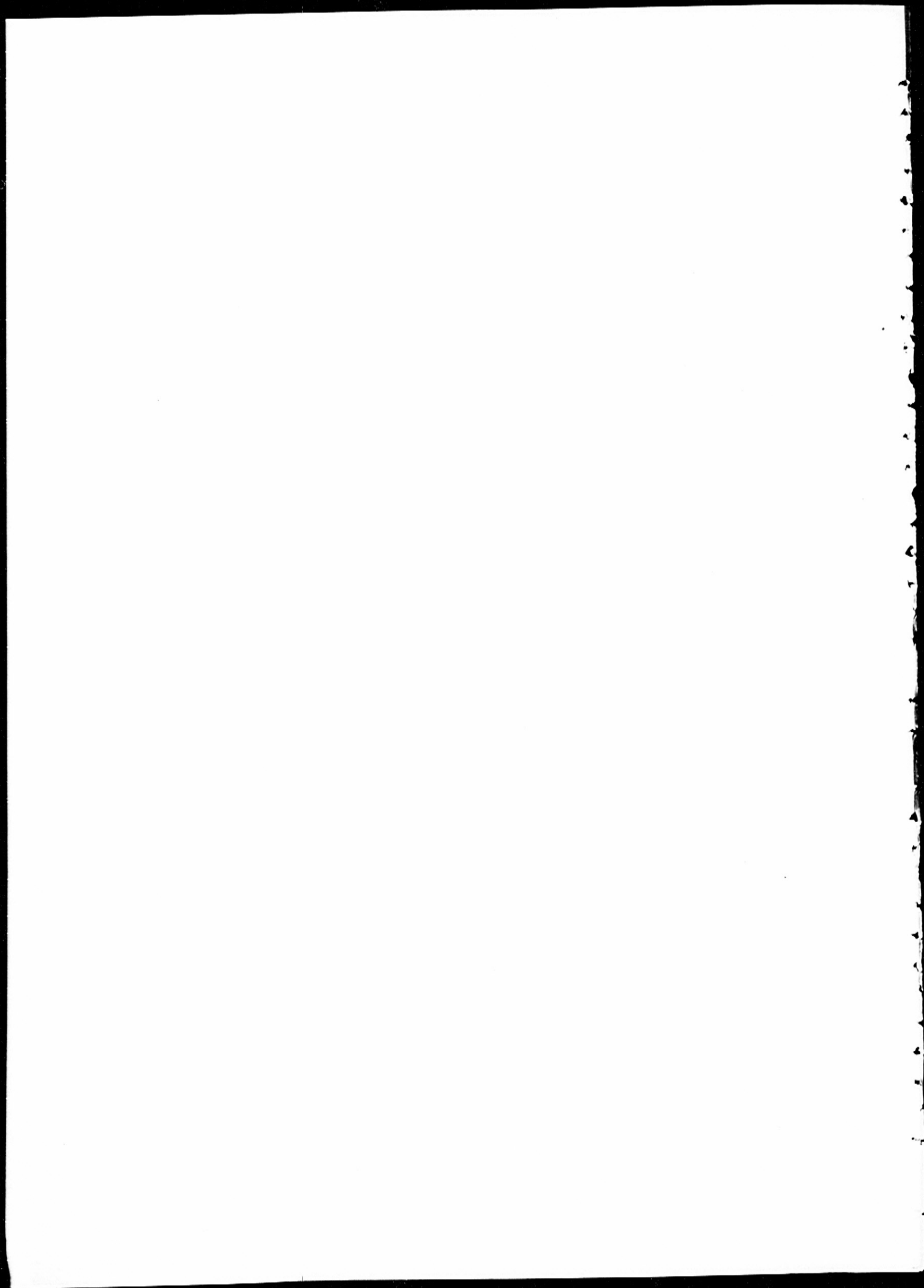
Attorney for Appellee.



(i)

STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court commit error in ruling that it had no jurisdiction over appellee, a non-resident foreign corporation, in an action brought in this Judicial District under Section 4 of the Clayton Act?
2. Did the District Court commit error in quashing substitute service of process in an action brought under Section 4 of the Clayton Act against a non-resident foreign corporation?



I N D E X

STATEMENT OF QUESTIONS PRESENTED.	i
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. JURISDICTION AND VENUE: THE CLAYTON ACT . .	2
II. SERVICE OF PROCESS	12
CONCLUSION	13

TABLE OF CASES

<u>Becker v. Angle</u> 165 F. 2d 140 (10th Cir. 1947)	7
<u>Grobark v. Addo Machine Co.</u> 18 Ill. App. 2d 10, 151 N. E. 2d 425 (1958)	5
<u>Hansen Packing Co. v. Armour & Co.</u> 16 F. Supp. 784 (D. C. S. D. N. Y. 1936).	4, 7
<u>Haskell v. Aluminum Co. of America</u> 14 F. 2d 864 (D. C. Mass. 1926)	3
<u>International Shoe Co. v. State of Washington</u> 326 U. S. 310 (1945).	5
<u>Oris v. Brickman</u> 95 F. Supp. 605 (D. C. D. C. 1951)	6
<u>Pfeiffer v. United Booking Office</u> 93 F. Supp. 363 (D. C. N. D. Ill. 1950)	7
<u>Riss & Co. v. Association of American R. R.</u> 24 F. R. D. 7 (D. C. D. C. 1959)	4
<u>Riss & Co. v. Association of Western R. R.</u> 159 F. Supp. 288 (D. C. D. C. 1958)	3
<u>Slater v. Peyser</u> 200 F. 2d 360 (D. C. Cir. 1952).	7
<u>Trippe Manufacturing Co. v. Spencer Gifts, Inc.</u> 270 F. 2d 821 (7th Cir. 1959).	5
<u>Wentling v. Popular Science Publishing Co.</u> 176 F. Supp. 652 (D. C. M. D. Pa. 1959).	5
<u>Westor Theatres v. Warner Bros. Pictures,</u> 41 F. Supp. 757 (D. C. N. J. 1941).	4, 7
<u>Winkler-Koch Engineering Co. v. Universal Oil Products Co.</u> 70 F. Supp. 77 (D. C. S. D. N. Y. 1946).	4, 7

(iii)

I N D E X (CONT'D)

Page No.

TABLE OF STATUTES CITED

15 U. S. C. 15 (Section 4, Clayton Act of 1914)	1,2, 4, 9
15 U. S. C. 22 (Section 12, Clayton Act of 1914)	1,4, 12, 13
Section 29-933, D. C. Code (1951)	12, 13
Section 29-933i(b), D. C. Code (1951)	9, 12, 13
Rule 4(e) of the Federal Rules of Civil Procedure	13
Rule 4(d)(3) of the Federal Rules of Civil Procedure	13

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NO. 15, 671

CURTIS BROTHERS, INC. ,
Appellant,

v.

THOMASVILLE CHAIR COMPANY,
Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

1. Section 4 of the Clayton Act vests jurisdiction over a defendant in the district court of the district wherein the defendant resides, is found or has an agent. Section 12 similarly provides for jurisdiction when a corporation is transacting business within a judicial district.

2. Appellee does not "reside", or maintain an agent in the District of Columbia. The only issue, therefore, is whether defendant is "found" in the District. In this jurisdiction, a corporation is "found" here if it is "transacting business" in the District.

3. To be regarded as "transacting business" in the District of Columbia, a corporation must do something more than merely solicit orders to be executed outside the District. This is commonly known as the "solicitation-Plus" rule.

4. The District Court twice ruled that on the evidence presented Thomasville Chair Company did not "transact business", and was not "found," within the District of Columbia because its activities involved no more than mere solicitation.

5. Since the District Court had no jurisdiction, service was ineffective without considering the question of substituted service under the D. C. Corporation Law.

ARGUMENT

I

JURISDICTION AND VENUE: THE CLAYTON ACT

Jurisdiction was sought to be established in the District Court by Section 4 of the Clayton Act of 1914 (15 U. S. C. Sec. 12, et seq.). (J. A. 2). Section 4 authorizes persons injured by alleged violations of the antitrust laws to sue "in the district in which the defendant resides, or is found or has an agent" (Emphasis added.)

Plaintiff has never contended that defendant "resides" within the District of Columbia so as to satisfy the jurisdictional requirements of the Act, and defendant has at all times denied that it so resides. (Affidavit of J. G. Pennington, J. A. 6-8). This, therefore, was not an issue before the District Court and is not presently before this Court on appeal.

Nor does defendant maintain an agent in the District of Columbia. Sam Harris, who solicits orders in the District on behalf of Thomasville, is a non-resident, independent sales representative whose only authorized function is to transmit orders he receives to the defendant's offices in Thomasville, North Carolina, where they are accepted or rejected. (J. A. 7-8). This sales representative is not an "employee" of the corporation under the Internal Revenue Code and other regulatory statutes. Defendant's sales representative is not an "agent" in the sense necessary to confer jurisdiction over the defendant in the District Court.

A. "FOUND"; "TRANSACTIONING BUSINESS": THE APPLICABLE LAW IN THE DISTRICT OF COLUMBIA

Whether defendant corporation is "found" within the District of Columbia, according to recent decisions of the District Court for the District of Columbia, depends upon whether it is doing business of such a nature as to justify the inference that it has submitted itself to the local jurisdiction.

In Riss & Co., Inc. v. Association of Western Railroads, 159 F. Supp. 288 (D. C. D. C. 1958), Judge Sirica stated the rule for determining venue in civil antitrust actions as follows:

"The underlying principle with respect to venue under Sec. 4 of the Clayton Act seems to be that, in order to be considered as 'found' in a judicial district, there must be a showing that a business entity is doing business of such a character as to justify the inference that it has submitted itself to the local jurisdiction. People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587 (1918). (Emphasis supplied.)

The rule was similarly stated in Haskell v. Aluminum Co. of America, 14 F. 2d 864 (D. C. Mass. 1926):

"It seems to be too firmly established to admit of argument that in statutes affecting venue the word 'found' has been given a definite regular significance when applied to foreign corporations, and it will be presumed that, when Congress enacted the Clayton Act, it used the word as defined by the Courts. Standard Oil Co. v. U. S., 221 U. S. 1 at 59, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

"Under these decisions, a foreign corporation might 'transact business' in the usual acceptance of the words, and still not 'be found' in the state where the business was transacted. Whether it was within the state, so as to be amenable to process therein, depended upon the character and extent of the business that was carried on; the general rule being that the nature and character of the business must be such 'as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents presently within the state or district where service is attempted. Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537."

Likewise, in Winkler-Koch Engineering Co. v. Universal Oil Products Co., 70 F. Supp (D. C. S. D. N. Y. 1946), also a treble damage action under the Clayton Act:

"Under Section 12 of the Clayton Act above referred to, this corporation not being an inhabitant of this district, process could only be served upon it if at the time of service it was 'found' here. If it were not found here, service of process here would not be within the statute even though the corporation is shown to have 'transacted business' in this district.

"A corporation may be said to be 'found' in a district when it is there present by its officers and agents carrying on the business of the corporation and doing business therein of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the district where service is attempted. Peoples Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 84, 87. The word 'found' seems to be synonymous with the words 'doing business'. To justify a finding that a corporation is found in a district requires a greater amount of 'doing business' than would justify a finding of 'transacting business' referred to in Section 12 of the Clayton Act. Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784-86."

See also Westor Theatres v. Warner Bros. Pictures, 41 F. Supp. 757 (D. C. N. J. 1941).

Where a commercial business entity is involved, "doing business" within the meaning of being "found" under Section 4, or "transacting business" within the meaning of Section 12, in this jurisdiction, presumably are synonymous.

In Riss & Co., Inc. v. Association of American Railroads, also a Section 4 case [subsequently decided, 24 F. R. D. 7 (D. C. D. C. 1959, CA 4056-54)], on motion of one of the defendants, Chicago & St. Louis Railway Co., to dismiss and quash service of process, Judge Alexander Holtzoff stated (Dec. 9, 1954):

"The law of this jurisdiction is that if a foreign corporation carries on solicitation of business in the District of Columbia and has no other activity, solicitation of business does not constitute the doing of business. It is true that it was held in the Frene case (Frene v. Louisville Cement Co., 77 App. D. C. 129) that very little more than solicitation may be sufficient

to constitute the doing of business in this jurisdiction. But it must be something more." (Emphasis supplied.)

"If solicitation of business does not constitute the doing of business, then surely maintaining an office at which nothing is done except solicitation of business does not add anything to that element. On the facts before the Court the only activity in this jurisdiction is the solicitation of business, from a small office maintained here in which two employees make their headquarters."

B. THE WENTLING CASE

Appellant in its brief (pp. 6-8) places great reliance on Wentling v. Popular Science Publishing Company, 176 F. Supp. 652 (D. C. M. C. Pa. 1959). If this case be the law in Pennsylvania as to jurisdiction, venue and "transacting business" so as to render a non-resident corporation subject to action under the Clayton Act, the District of Columbia courts have not seen fit to concur. Furthermore, it has been suggested that to assert jurisdiction in just such a situation as existed in the Wentling case would do violence to the concept of "minimal contact" expounded in International Shoe Co. v. State of Washington, 326 U. S. 310, 90 L. Ed. 94, 66 Sup. Ct. 154, and constitute a denial of due process. Such was the rationale of Grobark v. Addo Machine Company, Inc., 18 Ill. App. 2d 10, 151 N. E. 2d 425 (1958) affirmed, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), subsequently cited and relied on in Trippe Manufacturing Company v. Spencer Gifts, Inc., 270 F. 2d 821 (7th Cir. 1959). In Grobark, as in Wentling, the corporation over which jurisdiction was sought was a non-resident which simply sold outright its products to independent businessmen who subsequently brought the goods at their expense into the state of the tribunal.

This arrangement was not enough to confer jurisdiction in Grobark (not a Clayton Act case) even though Illinois has adopted the very liberal "minimum contact" test of International Shoe. It is submitted that the Wentling decision is of doubtful merit and should be given no weight in view of the requirement of solicitation plus which prevails as the law of this and other jurisdictions.

C. THE DECEMBER 14 HEARING

At the hearing on December 14, 1959, on defendant's motions to quash and dismiss, the District Court also stated that jurisdiction in a Clayton Act case would not rest in the District Court for the District of Columbia unless more than mere solicitation were shown. (J. A. 9, 12).

In support of its motions, defendant had filed an affidavit which established that the defendant, a North Carolina corporation, engaged in manufacturing wood household furniture, had all of its offices and manufacturing plants at Thomasville, North Carolina; that it maintained no offices and made no contracts in the District of Columbia, and orders for its products were solicited in the District of Columbia by one Sam Harris, an independent sales representative, not an employee of the defendant. The affidavit further established that all orders solicited in the District of Columbia were subject to approval and acceptance by the corporation at its offices in Thomasville, North Carolina; that all furniture sold to customers in the District of Columbia was delivered to an independent carrier in North Carolina for shipment f. o. b. at the expense of the buyer, and that all payments for such furniture were remitted to the company at Thomasville. (J. A. 6, 8). In short, defendant's activities in the District were limited precisely to solicitation of contingent orders by an independent sales representative.

Plaintiff filed no counter-affidavit (J. A. 10) nor denied any of the facts contained in defendant's affidavit. These facts, therefore, as set forth in the latter's affidavit, were and had to be regarded as true. Oris v. Brickman, 95 F. Supp. 605 (D. C. D. C. 1951). Furthermore, plaintiff presented no testimony tending to show that Thomasville engaged in more than the solicitation in the District of Columbia of business to be transacted outside the District. Accordingly, defendant's motions to quash and dismiss were granted on the ground that there was no evidence presented by plaintiff to enable the court to deny the motions. (J. A. 26, 27).

D. THE JANUARY 15 HEARING

On January 15, 1960, at the hearing on plaintiff's motion to reconsider, the burden rested upon the plaintiff to establish that the District Court had erred in granting defendant's motions to quash and dismiss. To meet that burden, it was incumbent on plaintiff to establish affirmatively that the service of process was lawful and proper, and that venue and jurisdiction rested in the District Court for the District of Columbia.

A motion to reconsider, like a motion for rehearing, under the Federal Rules, is equivalent to a motion for a new trial, and must set up some error of law. Slater v. Peyser, 200 F.2d 360, 361 (D. C. Cir. 1952). Plaintiff, therefore, on his motion to reconsider, had the burden to demonstrate that on the basis of additional facts, the District Court was clearly wrong in its decision granting defendant's motions to quash service and dismiss the complaint.

"One who invokes the jurisdiction of the court must not only allege the jurisdictional facts, but he has the burden of showing that he is properly in court. 'If the allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof and where they are not so challenged, the court may still insist the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence.' " Becker, et al v. Angle et al, 165 F.2d 140 (10th Cir. 1947).

A re-statement of this principle and its application to antitrust actions is also set forth in the following cases:

Pfeiffer v. United Booking Office, 93 F. Supp. 363, 365, (D. C. N. D. Ill. 1950).

Winkler-Koch Engineering Co. v. Universal Oil Products Co., 70 F. Supp. 77, 85 (D. C. S. D. N. Y. 1946).

Westor Theatres, Inc. et al v. Warner Bros. Pictures, et al, 41 F. Supp. 757, 760-61 (D. C. N. J. 1941).

Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784, 787 (D. C. S. D. N. Y. 1936).

In each of the above four cases, the complaint was dismissed as to one or more defendants for plaintiff's failure to sustain their burden of proof with respect to venue.

Since plaintiff failed completely at the initial hearing to sustain this burden, the rulings of the District Court were proper; in fact, inescapable. On its motion to reconsider, plaintiff again failed to establish either (1) that the rulings of the District Court were erroneous, or (2) that on the basis of new evidence, the District Court had jurisdiction and service of process was valid.

Plaintiff's affidavit, executed by Charles W. Curtis, (J. A. 15), denied none of the basic facts established at the hearing on December 14, 1959. There was, and remains, no dispute that defendant's business activity in the District of Columbia, as above recited, consisted of solicitation of orders through a non-resident travelling sales representative, not an employee of defendant. The Curtis affidavit recited only conclusions to the effect that defendant's travelling sales representative had authority to act for or bind the company. In addition, it alleged that defendant's independent sales agent performed other activities within the District of Columbia which inferentially constituted "doing business" or being "found" to support service under the D. C. Corporation Law, and to establish venue and jurisdiction under Section 4 of the Clayton Act. Plaintiff's affidavit recited four of such alleged activities to defendant's sales representative.

First, it asserted that whenever plaintiff had any complaints or questions "concerning the condition, delivery, prices, advertising or other matters", these were taken up with defendant's sales representative. The affidavit referred to no specific instances. More important, it did not even allege that any action was taken by defendant's representative, Harris, on any of these matters. The affidavit stated only that such complaints or questions "were taken up"; it does not assert that anything was done by Harris in the District of Columbia or elsewhere.

Defendant, obviously, has no control over the questions or complaints which its customers or customers of customers, might raise. It can, however, attempt to control the manner in which they are subsequently handled. The affidavits filed by defendant stated unequivocally that Harris had no authority to adjust complaints, or to resolve any questions regarding defective merchandise, prices, delivery, etc., and that all such matters were taken up by plaintiff with the factory or office of defendant at Thomasville, North Carolina. (J. A. 19, 21).

This allegation, therefore, did not establish any activity in the District of Columbia, by either defendant corporation, or its sales representative. It did not, therefore, constitute any basis for claiming error in the previous rulings of the District Court, or establish any ground for contending that defendant was amenable to substitute service of process under Title 29, D. C. Code, Section 933i(b), (supra), or was to "be found" within the District of Columbia for purposes of suit under Section 4 of the Clayton Act.

Plaintiff's affidavit also asserted that defendant's sales representative would give plaintiff advice and assistance in arranging displays on plaintiff's showroom floor of defendant's product, and would advise plaintiff on the type of newspaper advertising which would promote the retail sale of defendant's furniture.

Again, plaintiff's affidavit failed to provide any details whatsoever concerning actual activities of Harris when they occurred, how frequently, etc. Furthermore, even these general statements were challenged in defendant's affidavits. Harris denied that he has ever advised Curtis Brothers, Inc., on advertising matters, or that he ever assisted Curtis Bros., Inc., in placing defendant's products on the floor for display purposes. The affidavit of Finch asserted that it was not the function or responsibility of defendant's independent sales representatives to render such advice or services, that they had no authority to do so, that Harris was not qualified to give such assistance, and, upon information and belief, denied that such services were rendered. Again, therefore, this recital of plaintiff supplied

no factual basis whatever to support a claim that the original rulings of the District Court were erroneous, or to establish de novo that service of process was valid, or that venue and jurisdiction under the antitrust laws in this proceeding rested in the District Court.

Plaintiff's final allegation of fact asserted that whenever a customer of plaintiff claimed that defendant's furniture was defective, defendant's sales representative would inspect such merchandise at the home of the customer to determine whether a replacement was justified. Again, the affidavit gave no details as to time, place, frequency or disposition of any such complaints. On the basis of the general allegation, the incident referred to could have occurred at any time since the parties first transacted business in 1938. Defendant's affidavit disputed any inference that such activities were regular or frequent. In fact, the affidavit of Harris asserted that this activity occurred only on one occasion within the District of Columbia, either for plaintiff or any other customer, and that it was done on this occasion only at the request of plaintiff.

Thus, there was before the District Court one isolated instance where an independent sales representative, at the request of plaintiff, visited the home of one of plaintiff's customers to determine whether defendant's product was defective. There was no evidence as to what, if anything, was done to constitute any "transacting" or "doing" of business. There was not even an allegation that defendant's sales representative was identified as representing any one other than plaintiff, Curtis Brothers, Inc.

Plaintiff offered no testimony or evidence to explain or supplement its Curtis affidavit. The District Court was indulgent in hearing out counsel as evidenced by the 78 pages of transcript taken at the hearing (J. A. 39). The District Court on several occasions questioned plaintiff's counsel to determine if that was "all" the evidence he had, and on each occasion an answer in the affirmative was given. (J. A. 27, 29, 32). No evidence proffered by the plaintiff was excluded. "All" the evidence

presented at the second hearing failed to alter the factual situation which was before the District Court at the hearing on December 14, 1959.

Construing the facts in the light most favorable to plaintiff, the record revealed that defendant's activities in the District of Columbia consisted of solicitation "only", except for the one isolated instance, not identified as to time, when a representative of defendant inspected one piece of furniture which plaintiff had sold to a customer within the District of Columbia.

The District Court was thus confronted with a record establishing that defendant had no office or other business identity in the District of Columbia, except the presence of its product in the possession and ownership of retail establishments; that it has no bank accounts, property, employees, officers or agents residing here, and appeared in the District only as its independent travelling sales representative, not under its direct supervision or control, saw fit to enter the District of Columbia to solicit orders which committed no one until accepted in North Carolina. Defendant corporation had not obtained a certificate of authority to transact business in the District of Columbia, nor taken any other local action to warrant any inference that it "has submitted itself to the local jurisdiction". In fact, the need to resort, in this case, to substitute service following, over a period of nearly two years, issuance of approximately ten summonses, all returned "not found", was convincing evidence to the contrary.

Accordingly, it followed that the District Court had no choice but to rule that the plaintiff had failed to establish error in its earlier rulings on defendant's motions by proof that Thomasville had engaged in more than mere solicitation so as to justify the "solicitation plus" requirement and establish jurisdiction and venue in the District Court.

II

SERVICE OF PROCESS

A. SUBSTITUTE SERVICE NOT AUTHORIZED

Since the District Court determined it had no jurisdiction over appellee in a Section 4 case, process issuing from the District Court naturally was ineffective. However, since the validity of substitute service has been raised by Appellant, Appellee respectfully submits that substitute service was not authorized either under Section 29-933i(b) of the D. C. Code or Section 12 of the Clayton Act.

Public Law 86-106, 86th Congress, approved July 23, 1959, amends several sections of the District of Columbia Corporation Law. Section 108 of said law was amended to permit substitute service on the District of Columbia Commissioners as the "agent" of foreign corporations "transacting business" in the District of Columbia without a certificate of authority. (29 D. C. Code, Sec. 933i).

Section 933 of that law specifies that a foreign corporation is not required to obtain a certificate of authority "by reason of the appointment of an agent for the solicitation of business not to be transacted in the District" (Emphasis added.)

The affidavit of J. G. Pennington established that the business (orders) solicited in the District by defendant's independent sales representative was within the statutory exception and was not "business to be transacted in the District". Orders taken by the representative were sent to North Carolina for acceptance or rejection. If accepted there, the merchandise was manufactured there and delivered to an independent carrier at the expense of the buyer. The buyer was billed from North Carolina and payment was made in North Carolina by the purchaser. Nothing was transacted within the District of Columbia, other than the solicitation of the order. (J. A. 7-8).

Section 933 expressly excepts such activity. Since defendant was not a foreign corporation required to obtain a certificate of authority, then under Section 933i (b), it was not a foreign corporation against which substitute service was authorized. The service of process, therefore, was properly quashed.

B. SECTION 933i (b) NOT APPLICABLE IN CLAYTON ACT CASES

Section 12 of the Clayton Act provides that service on a corporation may be made "in the district of which it is an inhabitant, or wherever it may be found." It is submitted that even if defendant were found to be transacting business within the District, substitute service as here attempted under Section 933i(b) would be ineffective. Service of process in antitrust actions is governed by Section 12 of the Clayton Act, and Rule 4(e) of the Federal Rules of Civil Procedure, not by Sec. 933i(b) of the District of Columbia Corporation Act or Rule 4(d)(3) of the Federal Rules of Civil Procedure.

CONCLUSION

The record amply supports the actions of the District Court at every stage. The Court went out of its way to insure that plaintiff's counsel had every opportunity to present any facts bearing on the issues. Yet, after the two hearings, there was no showing that defendant's activity in the District was such that would support a finding that defendant was either "found" or "transacting business" therein under prevailing law.

There was most certainly no error in the decision on the original motion. Nor, on reconsideration, in the absence of significant additional evidence, was any error committed in reaffirming the order granting defendant's motions to quash and dismiss.

It is respectfully submitted, therefore, that the Court below committed no error and the appeal should be dismissed or the order of the District Court of January 18, 1960, should be affirmed.

RAYMOND S. SMETHURST

1511 K Street, N. W.,
Washington 5, D. C.

Attorney for Appellee.

June 17, 1960.

